No. 02-102-CSY Title: John Geddes Lawrence and Tyron Garner, Petitioners
v.
Texas

Docketed: July 19, 2002 Court: Court of Appeals of Texas, Fourteenth District

Entry	Date	Proceedings and Orders
	Jul 16 2002	Petition for writ of certiorari filed. (Response due August 18, 2002)
	Jul 16 2002	LODGING consisting of copies of lower court opinions in similar cases submitted by the petitioners.
	Aug 13 2002	Waiver of right of respondent Texas to respond filed.
	Aug 16 2002	Motion of Pro Family Law Center for leave to file a brief as amicus curiae filed.
	Aug 16 2002	Brief amicus curiae of American Civil Liberties Union filed.
	Aug 28 2002	DISTRIBUTED for Conference of September 30, 2002
	Sep 19 2002	Brief amici curiae of Stonewall Law Association, et al. filed.
	Sep 19 2002	Response requested.
	Oct 21 2002	Brief of respondent Texas in opposition filed.
	Nov 5 2002	Reply brief of petitioners John G. Lawrence and Tyron Garner filed.
	Nov 6 2002	REDISTRIBUTED for Conference of November 27, 2002
	Dec 2 2002	Motion of Pro Family Law Center for leave to file a brief as amicus curiae GRANTED.
	Dec 2 2002	Petition GRANTED. SET FOR ARGUMENT March 26, 2003. **********
	Dec 13 2002	Motion of petitioner to dispense with printing the joint appendix filed.
	Jan 13 2003	Motion of petitioner to dispense with printing the joint appendix GRANTED.
	Jan 15 2003	Brief amici curiae of Constitutional Law Professors, Bruce Ackerman, et al. filed.
	Jan 15 2003	Brief amici curiae of American Civil Liberties Union and ACLU of Texas filed.
	Jan 16 2003	Brief of petitioners John Geddes Lawrence and Tyron Garner filed.
	Jan 16 2003	Brief amici curiae of Mary Robinson, et al. filed.
	Jan 16 2003	Brief amici curiae of American Psychological Association, et al. filed.
	Jan 16 2003	Brief amici curiae of Human Rights Campaign, et al. filed.
	Jan 16 2003	Brief amici curiae of Republican Unity Coalition and Alan K. Simpson filed.
	Jan 16 2003	Brief amicus curiae of Professors of History,George Chauncey, et al. filed.
	Jan 16 2003	Brief amici curiae of Alliance of Baptists, et al. filed.
	Jan 16 2003	Brief amicus curiae of Cato Institute filed.
	Jan 16 2003	Brief amici curiae of National Lesbian and Gay Law Association, et al. filed.
	Jan 16 2003	Brief amicus curiae of NOW Legal Defense and Education Fund filed.
	Jan 16 2003	Brief amici curiae of Log Cabin Republicans and Liberty

Entry	Date	Proceedings and Orders
		Education Reform filed.
	Jan 16 2003	Brief amici curiae of American Public Health Association, et al. filed.
	Jan 16 2003	Brief amicus curiae of American Bar Association filed.
	Jan 16 2003	Brief amicus curiae of Institute for Justice filed.
	Feb 3 2003	CIRCULATED.
	Feb 14 2003	Brief amici curiae of Texas Eagle Forum, et al. filed.
	Feb 14 2003	Brief amicus curiae of Center for the Original Intent of the Constitution filed.
	Feb 18 2003	Brief of respondent Texas filed.
	Feb 18 2003	Motion of Center for Marriage Law for leave to file a brief as amicus curiae filed.
	Feb 18 2003	Brief amici curiae of American Family Association, Inc., et al. filed.
	Feb 18 2003	Brief amicus curiae of Concerned Women for America filed.
	Feb 18 2003	Brief amicus curiae of American Center for Law and Justice filed.
	Feb 18 2003	Brief amici curiae of Alabama, South Carolina, and Utah filed.
	Feb 18 2003	Brief amici curiae of Texas Legislators, et al. filed.
	Feb 18 2003	Brief amici curiae of Public Advocate of United States, et al. filed.
	Feb 18 2003	Brief amici curiae of Center for Arizona Policy and Pro-Family Network filed.
	Feb 18 2003	Brief amici curiae of Texas Physicians Resource Council, et al. filed.
	Feb 18 2003	Brief amicus curiae of Liberty Counsel filed.
	Feb 18 2003	Brief amicus curiae of First Principles, Inc. filed.
	Feb 18 2003	Motion of Center for Law and Justice International for leave to file a brief as amicus curiae filed.
	Feb 19 2003	Brief amicus curiae of Agudath Israel of America filed.
	Feb 25 2003	Petitioners' response to motions of Center for Law and Justice Internatl. and Center for Marriage Law for leave to file amicus briefs filed.
	Mar 3 2003	Motion of Center for Marriage Law for leave to file a brief as amicus curiae GRANTED.
	Mar 5 2003	Motion of respondent and Alabama, et al. for leave to allow Alabama, et al. to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 10 2003	Motion of Center for Law and Justice International for leave to file a brief as amicus curiae GRANTED.
	Mar 10 2003	Reply brief of petitioners John G. Lawrence and Tyron Garner filed.
	Mar 21 2003	Motion of respondent and Alabama, et al. for leave to allow Alabama, et al. to participate in oral argument as amicus curiae and for divided argument DENIED.
	Mar 26 2003	ARGUED.

Supreme Court, U.S.
FILED

02 102 JUL 16 2002

OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the Fourteenth Amendment guarantee of equal protection of the laws?

2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

PARTIES

Petitioners are John Geddes Lawrence and Tyron Garner. Respondent is the State of Texas.

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In this case, the full power of the criminal law was brought to bear against Petitioners John Lawrence and Tyron Garner, who were arrested, held in custody, convicted, and punished for engaging in consensual sexual intimacy in the privacy of one of their homes. Texas's "Homosexual Conduct" law targets gay and lesbian couples while leaving heterosexual couples free to engage in the very same acts. The Texas statute invades consensual, adult intimacy that is an integral part of forming and nurturing long-term relationships; it pries into the home; and it regulates at the uniquely intrusive level of how chosen partners physically express their affections for one another. Petitioners challenge the Texas statute and their convictions under the rights to equal protection and to privacy and liberty guaranteed by the United States Constitution.

OPINIONS AND ORDERS BELOW

The Texas Court of Criminal Appeals' orders refusing discretionary review are unreported. App. 1a, 2a. The decision of the *en banc* Court of Appeals for the Fourteenth District of Texas is reported at 41 S.W.3d 349. App. 4a. The court's prior panel opinion is unreported. App. 80a. The judgments entered by the Harris County Criminal Court are unreported. App. 107a, 109a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2001. App. 3a. On April 17, 2002, the Texas Court of Criminal Appeals denied a timely consolidated petition for discretionary review. App. 1a, 2a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor."

Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The Homosexual Conduct Law

Texas law criminalizes private consensual adult sexual conduct when engaged in by same-sex couples, but not identical conduct by different-sex couples. The Texas Penal Code defines certain conduct, including oral and anal sex, as "deviate sexual intercourse," *without* regard to whether the actors are of the same or different sexes. *See* Tex. Pen. Code § 21.01(1); *C.M. v. State*, 680 S.W.2d 53, 56 (Tex. App. – Austin 1984, no writ). The Code makes "deviate sexual intercourse" a crime, for all, when it occurs in public. Tex. Pen. Code § 21.07(a)(2). The Code also criminalizes sexual conduct, for all, whenever it is without consent, *id.* § 22.011(a)(1), in exchange for money, *id.* § 43.02, or with a minor, *id.* §§ 22.011(a)(2), 21.11. But in addition to those crimes, the

Texas Penal Code creates a separate offense, called "Homosexual Conduct," that consists simply of engaging in so-called "deviate sexual intercourse" with another person of the same sex. *Id.* § 21.06 (the "Homosexual Conduct Law" or "Section 21.06"). Thus, the Homosexual Conduct Law criminalizes private, adult, consensual sexual conduct for same-sex couples only, but not identical conduct by different-sex couples.[1]

Because it singles out same-sex couples, this law is unlike the typical common law prohibition on "sodomy," and differs fundamentally from the Georgia law considered by the Court in *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986).[2] The evolution of Texas law illustrates this unusual quality. In 1860, Texas adopted a law prohibiting anal sodomy for all persons. 1860 Tex. Crim. Stat. art. 342. In 1943, the State added a general proscription against oral sex to the statute. 1943 Tex. Sess. Law Serv. ch. 112, § 1 (Vernon). In the early 1970s, however, the general law focusing on these acts was repealed and the present law, narrowed to cover only certain persons, was adopted. 1973 Tex. Gen. Laws ch. 399, § 1.

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[1] The behaviors labeled "deviate sexual intercourse" by Texas are widely practiced by different-sex as well as same-sex couples. *See, e.g.* Edward O. Laumann *et al.*, *The Social Organization of Sexuality* 98-99 (1994) (comprehensive study by University of Chicago researchers of sexual practices of American adults, finding that approximately 79% of all men and 73% of all women had engaged in oral sex, and 26% of all men and 20% of all women had engaged in anal sex).

[2] When the Fourteenth Amendment was ratified, only three of the 37 States had sodomy laws limited to male-male couples, and none had laws that targeted all same-sex couples but exempted different-sex couples. Most of the other States had sodomy laws that applied generally. Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1082-84 (1998).

As an increasing number of States abandoned sodomy offenses that applied to all, a few in the 1970s and 1980s enacted new statutes that specifically targeted homosexual couples. Most States that adopted such laws, however, have already abandoned them. *See infra* note 26. Today, in addition to Texas, only Kansas has an explicitly same-sex-only sodomy law in full force and effect, Kan. Stat. Ann. § 21-3505(a)(1); Missouri enforces such a statute in part of that State, *see* Mo. Rev. Stat. § 566.090;[3] and Oklahoma's general sodomy statute has been judicially construed to exclude heterosexual consensual behavior, *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986); Okla. Stat. tit. 21, § 886. Nine other States retain criminal laws that bar consensual sodomy for all.[4]

In earlier civil litigation, a Texas intermediate court struck down the State's Homosexual Conduct Law as unconstitutional. *State v. Morales*, 826 S.W.2d 201 (Tex. App.-Austin 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994). The Texas Supreme Court subsequently held, however, that the constitutionality of the law could not be decided in a civil declaratory judgment action. It ruled that constitutional review should occur in the context of a criminal prosecution, with final review in the Texas Court of Criminal Appeals. 869 S.W.2d at 943-47. In the present case, however, the latter court refused

[3] One state court of appeals in Missouri has construed that State's same-sex-only law not to apply to consensual behavior, *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999), but prosecutions still occur elsewhere in the State, *see Six Men Charged Under Rarely Used Homosexual Intercourse Law*, Assoc. Press Newswires, Mar. 30, 2002.

[4] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(A).

to exercise its jurisdiction to review the law, App. 1a, 2a, leaving its uniquely intrusive burdens in effect throughout Texas.

B. Petitioners' Arrests, Convictions, and Appeals

Late in the evening of September 17, 1998, sheriff's officers entered the private home of Petitioner Lawrence while investigating a false report of a "weapons disturbance." App. 129a, 141a; Clerk's Record in *State v. Lawrence*, at 6 ("C.R.L."); Clerk's Record in *State v. Garner*, at 6 ("C.R.G.").[5] There, they intruded on Lawrence and Garner having sex. App. 129a, 141a. The officers arrested Petitioners, and they were not released until a day later. *See* C.R.L. 3; C.R.G. 3.

The State charged Petitioners with violating Section 21.06. The sole facts alleged by the State to make out a violation were that each Petitioner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. 127a, 139a. The State did not allege that the sexual conduct was public, violent or non-consensual, with a minor, or in exchange for money. App. 127a, 129a, 139a, 141a. The charges rested solely on consensual, adult sexual relations with a partner of the same sex in the privacy of Lawrence's home. *Id.*

After proceedings and initial convictions in the Justice of the Peace Court, Petitioners appealed for a trial *de novo* to the Harris County Criminal Court. C.R.L. 15; C.R.G. 12. They filed motions to quash the charges on the ground that the law is unconstitutional on its face and as applied to their "consensual, adult, private sexual relations with another person of the same

[5] The person who called in the report later admitted his allegations were false and was convicted of filing a false report. *See* R.A. Dyer, *Two Men Charged Under State's Sodomy Law*, Hous. Chron., Nov. 6, 1998, at 1A.

sex." App. 118a, 131a. Petitioners each contended that the Homosexual Conduct Law violates their "right to equal protection under the Equal Protection Clause of the Fourteenth Amendment," including by discriminating on the basis of sexual orientation. App. 117a, 119a-120a, 130a, 132a-133a. Petitioners also argued that the law violates the federal constitutional rights to privacy and due process, invoking the Bill of Rights generally, and the First, Fourth, Fifth, Ninth and Fourteenth Amendments specifically, and contending that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was wrongly decided. App. 117a, 121a-122a, 130a, 134a-135a.[6]

On December 22, 1998, the court denied the motions to quash. App. 113a. Lawrence and Garner then pled *nolo contendere*. App. 114a. The Court accepted the pleas after the State's recitation of prima facie facts taken only from its complaints, found both men guilty, and imposed on each $200 in fines and $141.25 in court costs. App. 107a-108a, 109a-110a, 116a.

In consolidated appeals to the Texas Court of Appeals, Lawrence and Garner continued all their federal challenges.[7] They argued that Section 21.06 impermissibly classifies between citizens "[u]nder any characterization of the classification." In particular, they urged that the law discriminates on the basis of sexual orientation without a sufficient justification. Amended

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[6] In addition, Lawrence and Garner raised state constitutional privacy and equal protection claims.

[7] Under the Texas Code of Criminal Procedure, a defendant entering a plea of *nolo contendere* has a right to appeal any issue raised in a written motion filed prior to trial. Tex. Code Crim. P. § 44.02; *Morgan v. State*, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985) ("the Legislature surely contemplated a meaningful appeal – one that addresses and decides each issue on its merits").

Brief of Appellants John Geddes Lawrence and Tyron Garner 4, 5, 6-17 ("Am. Br."); Additional Brief of Appellants 1 n.1, 14-22 ("Add'l Br."); Petition for Discretionary Review 7-13 ("Pet. Disc. Rev."). They continued to argue that under the federal Constitution the statute "invades the privacy rights of Mr. Garner and Mr. Lawrence by enabling the government to punish them for engaging in sexual relations in the privacy of Mr. Lawrence's home," and to preserve their contention that *Bowers* was wrongly decided. Am. Br. 5, 23-26; Add'l Br. 23 n.20; Pet. Disc. Rev. 16-19.

At oral argument in the appellate court, the State conceded that there is no compelling government justification for Section 21.06. App. 76a (Anderson, J., dissenting) (state counsel "could not 'even see how he could begin to frame an argument that there was a compelling State interest,' much less demonstrate that interest for [the] Court"). Texas repeatedly has identified its only aims as "enforcement of principles of morality and the promotion of family values." *See, e.g.*, State's Brief in Support of Rehearing En Banc 16.

On June 8, 2000, a panel of the Court of Appeals reversed Petitioners' convictions under the Texas Equal Rights Amendment, holding that Section 21.06 discriminates on the basis of sex. App. 86a-92a. The State moved for rehearing *en banc*, which was granted. On March 15, 2001, the *en banc* Court of Appeals reinstated Petitioners' convictions. App. 3a, 4a. Citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), the court rejected Petitioners' federal privacy claim. App. 24a-31a. As to the federal equal protection claim, the court held that the statute was subject to and survived rational basis review, because it "advances a legitimate state interest, namely, preserving public morals." App. 13a. The court distinguished *Romer v. Evans*, 517 U.S. 620 (1996),

as limited to discrimination in the right to seek legislation. App. 14a-15a.

Two Justices of the appellate court "strongly" dissented from the rejection of Petitioners' federal equal protection arguments. App. 42a. The dissent reasoned that:

> where the same conduct, defined as "deviate sexual intercourse[,]" is criminalized for same sex participants but not for heterosexuals[,] [t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict.

App. 44a.

On April 13, 2001, Petitioners filed their Petition for Discretionary Review with the Texas Court of Criminal Appeals. On April 17, 2002, that court refused review. App. 1a, 2a.

REASONS FOR GRANTING THE WRIT

The Texas Homosexual Conduct Law has made Petitioners Lawrence and Garner convicted criminals based solely on their private sexual activity in Lawrence's home. By this law, Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not. That discriminatory criminalization tears at gay relationships and stigmatizes loving behavior that others can engage in without the brand of "lawbreaker." The law sends a powerful signal from the State condemning homosexuals. Not surprisingly, then, it is also used to justify discrimination against gay men and lesbians in parenting, employment, access to civil rights laws, and many other aspects of everyday life. This Court

should grant review because the direct and indirect harms imposed by this law and others like it are a glaring affront to the Constitution's guarantee of equal protection.

Much of the reason these laws and harms persist is traceable to the Court's reasoning in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which is in tension with the Court's equal protection jurisprudence, including *Romer v. Evans*, 517 U.S. 620 (1996). Only this Court can step in to make clear that its due process analysis of Georgia's general sodomy statute in *Bowers* does not, despite that decision's focus on "homosexual sodomy," endorse the validity of same-sex-only bans on consensual sexual intimacy under the Equal Protection Clause. As a matter of equal protection, bare condemnation of one group of people – whether termed a moral judgment, a value judgment, or simple dislike – cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny. This equal protection question is separate and independent from the privacy claim also urged here, and confusion in equal protection law independently warrants the Court's intervention.

The time has come, too, for reconsideration of *Bowers*. In the sixteen years since that decision, legal and social developments have undercut its reasoning and its ultimate determination that the right to privacy does not shelter the deeply personal realm of consensual, adult sexual intimacy in the home. That decision should be reversed, for Petitioners as for their gay and non-gay fellow citizens. Since 1986, this Court has employed substantive due process analyses that are less rigidly determined by history and has articulated strong spatial privacy values, particularly in the home. In the same period, more and more States have followed the American tradition that bars government from intruding into couples' consensual sexual and emotional

intimacies in the bedroom, so that now three-fourths of the States have rejected both same-sex-only and general sodomy laws. *Infra* at 24 & note 26. Finally, both law and society now widely recognize the connection between same-sex intimacy and committed relationships, families with children, and households fundamentally like those inhabited by heterosexuals. The Court should take this opportunity to address and protect Petitioners' fundamental rights of privacy and liberty.

I. Whether Equal Protection Permits a State To Impose Wide-Ranging Harms on Gay People by Criminalizing Their Intimate Conduct, While Leaving Others Free To Engage in the Same Conduct, Is a Question of Critical Importance.

There is a compelling need for the Court to take this opportunity to address whether a State may criminalize particular sexual acts only when practiced by same-sex couples. Texas's discriminatory law not only exposes gay couples to prosecution, but also encourages and is used to justify many other forms of inequality against lesbians and gay men. The Homosexual Conduct Law's direct and indirect consequences are contrary to the Constitution's "commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623.

A. The Homosexual Conduct Law and Other Laws Like It Brand Gay People as Second-Class Citizens and Are Used To Justify Further Discrimination.

The law at issue here causes grave harms to those who are prosecuted and to all other gay and lesbian Texans. Lawrence and Garner are now convicted criminals because of who they are, not because of what they were doing in Lawrence's home when the police intruded. Only same-sex couples can run afoul of the Homosexual Conduct Law, which – true to its name – uses

the definition of a gay sexual orientation to trigger illegality. A homosexual is a person who seeks sexual intimacy with a partner of the same sex.[8] The Homosexual Conduct Law flatly forbids lesbians and gay men from engaging in basic forms of sexual expression that are open to and wholly legal for heterosexuals.

Thus, as the Kentucky Supreme Court observed in striking down that State's discriminatory sodomy law, "[s]exual preference, and not the act committed, determines criminality, and is being punished." *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992); *see also State v. Limon*, No. 85,898, slip op. at 6 (Kan. Ct. App. Feb. 1, 2002) (where a law punishes same-sex couples much more harshly than "members of the opposite sex," "the argument that it is not aimed at homosexuals cannot be made with a straight face").[9] *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews").

The "special disability" imposed on lesbians and gay men by the Homosexual Conduct Law has "severe consequence[s]," *Romer*, 517 U.S. at 629, 631. First, based on nothing more than the identity of their chosen partners in private sexual relations,

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[8] *See, e.g.*, John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *Homosexuality: Research Implications for Public Policy* 1 (Gonsiorek & Weinrich eds., 1991) ("*sexual orientation* is erotic and/or affectional disposition to the same and/or opposite sex"); *Webster's Ninth New Collegiate Dictionary* 579, 568 (Merriam-Wesbster Inc. 1991) ("homosexual" is one who "direct[s] sexual desire toward another of the same sex"; "heterosexual" is one who "direct[s] sexual desire toward the opposite sex"). For gay and lesbian people, just as for heterosexuals, adult relationships typically include sexual, emotional, intellectual, and familial aspects. Yet, *sexual* orientation, at its base, focuses on the orientation of one's sexual attraction – to a person of the same or of a different sex.

[9] Petitioners have lodged copies of *Limon* with the Clerk of the Court.

Lawrence and Garner were arrested and held in custody for more than a day – a humiliating invasion of personal dignity. "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief.... And once the period of custody is over, the fact of the arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting).[10]

Petitioners now each have a criminal conviction for private consensual sexuality. This "finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties." *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2398 (2002).

Moreover, "[t]he Texas courts have held that the crime of homosexual conduct . . . is a crime involving moral turpitude." *In re Longstaff*, 538 F. Supp. 589, 592 (N.D. Tex. 1982) (citation omitted), *aff'd*, 715 F.2d 1439 (5th Cir. 1983). Petitioners' convictions may therefore be used in Texas court proceedings to impeach their character and credibility. *See* Tex. R. Evid. 404(a)(1)(B); Tex. R. Evid. 609(a). The convictions could also enhance a prison sentence if a subsequent federal conviction occurred. *See* U.S. Sentencing Guidelines Manual §§ 4A1.1(c), 4A1.2(c). They disqualify or restrict Lawrence and Garner from practicing dozens of professions in Texas, from physician to

[10] Although Section 21.06 does not authorize imprisonment as a penalty, prison terms can be imposed in the other states with same-sex-only sodomy prohibitions. *See* Okla. Stat. tit. 21, § 886, *amended by* Okla. Sess. Law Serv. ch 460, § 8 (2002) (ten years); Mo. Rev. Stat. §§ 566.090, 558.011 (one year); Kan. Stat. Ann. §§ 21-3505, 21-4502 (six months).

athletic trainer to bus driver.[11] In four states, Lawrence and Garner are considered sex offenders and would have to register with law enforcement as such.[12]

Even apart from direct criminal enforcement, same-sex-only sodomy prohibitions attach a badge of criminality to intimate same-sex relations. *See Jegley v. Picado*, No. 01-815, __ S.W.3d __, 2002 Ark. LEXIS 401, at *30-*31 (Ark. July 5, 2002)[13] (under same-sex-only sodomy laws, gay and lesbian citizens "suffer the brand of criminal impressed upon them by a[n] . . . unconstitutional law").[14] The Homosexual Conduct Law interferes with more than specific sex acts – it strikes at gay relationships in a deeply harmful manner. For gay adults, as for heterosexual ones, sexual expression is integrally linked to forming and nurturing the close personal bonds that give humans the love, attachment, and intimacy they need to thrive. *See, e.g.*, L. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples*, in *Sexuality in Close Relationships* 177-91 (K. McKinney & S. Sprecher eds. 1991);

[11] *See, e.g*, Tex. Occ. Code § 451.251(a) (athletic trainer); *id.* § 164.051(a)(2)(B) (physician); *id.* § 301.409(a)(1)(B) (registered nurse); *id.* § 401.453(a) (speech-language pathologist); *id.* § 1053.252(2) (interior designer); *id.* § 2001.102 (bingo licensee); Tex. Educ. Code § 512.022(f) (school bus driver); Tex. Alco. Bev. Code § 11.46(a)(3) (liquor sales).

[12] *See* Idaho Code §§ 18-8301 to 18-8326; La. Rev. Stat. Ann. §§ 15:540-15:549; Miss. Code Ann. §§ 45-33- 21 to 45-33-57; S.C. Code Ann. §§ 23-3-400 to 23-3-490.

[13] Petitioners note that the LEXIS pagination of the *Jegley* decision is non-final and subject to change at the time this Petition is being filed.

[14] In Texas, calling someone a "homosexual" or using epithets that mean the same is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Civ. App.–Houston [14th Dist.] 1980, no writ).

C. Leslie, *Creating Criminals: The Injuries Inflicted By "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 116-20 (2000).

Same-sex sodomy statutes are also widely cited to uphold additional discrimination without reasoned justification. As the State stipulated in an earlier challenge to Section 21.06, it "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales*, 826 S.W.2d at 202-03. This law and similar statutes in other states are routinely invoked to limit the custody or visitation that fit, gay parents would otherwise have with their biological children, without any showing of indiscretion or that the child's best interests are jeopardized. *See, e.g., Jegley*, 2002 Ark. LEXIS 401, at *29 (citing case in which analogous Arkansas law was held relevant factor in denying custody to gay parent).[15] Furthermore, these laws are used to block the adoption of civil rights ordinances that would prohibit sexual orientation discrimination.[16]

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[15] *See also* Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, Hous. Chron., June 27, 1994, at A11 (reporting that common tactic of vilifying gay parents in custody battle is "give[n] . . . teeth by § 21.06"); *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (restricting gay father's visitation rights, in part because a "statute of this state declares that deviate sexual intercourse with another person of the same sex is illegal. § 566.090.1"). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws In Civil Litigation*, 79 Tex. L. Rev. 813 (2001).

[16] *See, e.g.*, Dianna Hunt, *Plan to Ban Anti-Gay Bias In Fort Worth Dies* Dallas Morning News, Jan. 20, 1999, at 32A (local anti-discrimination measure in Texas abandoned after several members of town council expressed desire to wait until status of state's sodomy law has been resolved); *see also* Arthur S. Leonard, Gay/Lesbian Law Notes (Summer 1998) (Kansas sodomy law cited in support of halting Topeka Human Rights Commission from investigating anti-gay discrimination).

To be sure, discrimination against gay and lesbian Americans is also frequently justified by reference to *general* sodomy laws that are *not* limited to same-sex couples. The Court's decision in *Bowers* – unchecked by any equal protection ruling involving sodomy statutes – contributes to this broad harm. *Bowers* described the case before it as being about "homosexual sodomy," *e.g.*, 478 U.S. at 190, even though the Georgia law at issue, and nearly every other sodomy law cited in *Bowers*, applied to specific acts by any and all couples, *see id.* at 200 (Blackmun, J., dissenting). As a result, consensual sodomy laws that, by their terms, apply to all are used uniquely to harm gay men and lesbians in the same range of ways as same-sex-only sodomy statutes. The laws are often cited as a basis for denying gay parents custody of or restricting their visitation with their own children.[17] Courts also have cited general sodomy laws as a ground for denying public employment to gay people, *see, e.g., Shahar v. Bowers*, 114 F.3d 1105, 1104 & n.17 (11th Cir. 1997), and to uphold public employment questionnaires that ask about homosexual conduct, *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (upholding question about homosexual relations "because the *Bowers* decision is controlling," even though "relevance of this type of question to Wall's employment is uncertain"). In the

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[17] *See, e.g., Weigand v. Houghton*, 730 So. 2d 581, 591 (Miss. 1999) (even though sodomy was not unlawful in State where gay father seeking custody lived, "[t]he element of morality must be resolved against [father] because of his homosexual activity which, if committed within this state would constitute felonious conduct"); *Ex Parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (affirming imposition of severe visitation restrictions on lesbian mother, reasoning, "the conduct inherent in lesbianism is illegal in Alabama"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (removing child from lesbian mother and giving custody to child's grandmother, concluding, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody").

political sphere, general sodomy laws have been invoked to block protection of gay citizens by state hate-crime legislation.[18] *See generally* Nan D. Hunter, *Life After* Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 542 (1992) (today "sodomy" has become "code word for homosexuality, regardless of statutory definition").

The real, significant, and ongoing harms suffered by Lawrence, Garner, and thousands of others under the Homosexual Conduct Law and similar statutes make this case one of substantial importance. In Texas and other States with a same-sex-only crime, a federal remedy is especially necessary because those States' own high courts – like the Court of Criminal Appeals here – have refused even to consider constitutional challenges to the laws. *See, e.g., City of Topeka v. Movsovitz*, 960 P.2d 267 (Kan. 1998) (table), *denying review of* No. 77,372 (Kan. Ct. App. April 24, 1998) (rejecting constitutional challenge to same-sex-only sodomy law).[19]

[18] An amendment to include "sexual orientation" in the Utah hate crime bill was defeated after a representative referred to Utah's sodomy law, stating that the "effect of granting special protection under [the hate crime act] to homosexuals would be contradictory under Utah law." *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 222. Similarly, a hate crime bill in North Carolina covering sexual orientation was rejected in 2000 after the House heard testimony about the illegality of sodomy. People for the American Way Foundation, *Hostile Climate: Report on Anti-Gay Activity* 257 (2000).

[19] Petitioners have lodged copies of the Kansas intermediate appellate court's decision in *Movsovitz* with the Clerk of the Court.

B. Under Basic Equal Protection Principles, Bare Disapproval of a Group of People, Whether Couched as "Morality" or Otherwise, Cannot Justify Discriminatory Laws.

The reasoning of the decision below conflicts with core equal protection principles that this Court has recognized in many cases. *See, e.g., Romer v. Evans*, 517 U.S. 620; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). The Texas court reached the wrong result by incorrectly limiting *Romer* to contexts involving "the right to seek legislative protection from discriminatory practices," App. 15a, despite *Romer's* use of the established rational basis test applicable to any legal classification. The Texas court further erred by reading *Bowers* – which expressly declined to address equal protection issues, 478 U.S. at 196 n.8, notwithstanding its references to "homosexual sodomy" – to support the State's "morality" justification for this discriminatory statute. Those errors are not isolated ones. They are spawned by ongoing confusion suggesting that *Bowers* might trump *Romer* in equal protection challenges to laws that discriminate against gay people.[20] The Court should grant *certiorari* both to make clear

[20] For example, the Kansas courts have upheld a criminal law scheme under which a male defendant was sentenced to imprisonment for more than 17 *years* for sexual conduct involving another male, even though the State's laws impose a maximum penalty (including applicable sentencing enhancements) of only 15 *months* for identical conduct if the other person had been female. *Limon*, slip. op at 5-6. (Copies of the *Limon* opinion have been lodged with the Clerk of the Court). Rejecting the defendant's equal protection challenge, the state court construed *Romer* narrowly, *id.* at 13, and upheld the sentencing disparity based on *Bowers*:

> The impact of *Bowers* on our case is obvious. The United States Supreme Court did not recognize homosexual behavior to be in a protected class requiring strict scrutiny

that *Bowers* does not legitimize laws targeting gay Americans for disfavored treatment and to reaffirm that class-based laws require justification beyond the majority's desire to make one group unequal.

Every instance of legislative line-drawing must at least satisfy the "conventional inquiry" of rational basis review. *Romer*, 517 U.S. at 632. This is true no matter how the classification is framed. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633. The only government interest offered by Texas here is a desire to "require adherence to certain widely accepted moral standards" or "family values." State's Appellate Brief 8 ("St. App. Br."). The disparity in treatment serves to condemn same-sex couples based on the majority's disapproval of them, yet leaves different-sex couples – the majority – free to engage in the very same conduct without censure.

This is no independent justification at all. It is just a statement that the legislature wants the criminal law to include this condemnation. If such a rationale, accepted by the court below,

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> of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently . . . .

Id. at 12; *see also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 295, 300 (6th Cir. 1997) ("the salient operative factors which motivated the *Romer* analysis and result were unique to that case"; discrimination against gays and lesbians can be justified as "the expression of community moral disapproval of homosexuality"); *Shahar*, 114 F.3d at 1109-10 & n.25. *But see Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996) ("Of course, *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*").

were sufficient, any discriminatory law could be justified with the statement that the legislature considered it "moral" to disadvantage the targeted group.

As the Court took pains to emphasize in *Romer*, "'[i]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534); *see also id.* at 635 (a State cannot classify "to make [one group of people] unequal to everyone else"); *Cleburne*, 473 U.S. at 448 ("mere negative attitudes . . . unsubstantiated by factors which are properly cognizable [by government], are not permissible bases" for discriminatory legal rules). Whether termed a moral judgment, a value judgment, a negative attitude, or bias, the majority's bare dislike of one group for engaging in consensual intimate behavior common to all kinds of adult couples cannot suffice to support the government's enactment of that kind of discriminatory standard into law. Texas's "reasoning" here is nothing more than a preference for one group of people and animus toward another.

Further, the line drawn in Section 21.06 is irrational and arbitrary. As supreme courts in other States have explained, "the discouragement of what has historically been perceived to constitute immoral behavior," St. App. Br. 8, cannot legitimize imposition of traditional morality only on a minority:

> "[T]he practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized. . . . The issue here is *not* whether sexual activity traditionally viewed as

> immoral can be punished by society, but whether it can be punished *solely on the basis of sexual preference*."

Jegley, 2002 Ark. LEXIS 401, at *55-*56 (emphasis added) (quoting *Wasson*, 842 S.W.2d at 499).

In striking down same-sex-only consensual sodomy laws, state courts have used state constitutional guarantees of equal protection that incorporate the same rational basis standards applied under the Fourteenth Amendment. *See, e.g., id.* at *52-*55 (relying on *Romer*, *Moreno*, and *Cleburne*, as well as Arkansas precedents). Those state high courts – unlike the court below – found no legitimate or rational basis for such laws. As explained by the Kentucky Supreme Court:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform.... We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.

Wasson, 848 S.W.2d at 501; *see also Gryczan v. State*, 942 P.2d 113, 127 (Mont. 1997) (Turnage, C.J., concurring in result by applying equal protection guarantees of both Montana and federal constitutions).

The Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose

on you and me." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *accord Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring). Yet, Texas now imposes the extremely intrusive burdens of traditional sexual mores only on same-sex couples, while exempting the heterosexual majority from traditional moral injunctions against the very same acts by them. This the State may not do.[21]

The State's inability to put forth even a rational and legitimate basis is fatal under any level of scrutiny. In addition, the Homosexual Conduct Law should be subjected to a more rigorous test than rational basis review. Gay Americans have historically been the targets of substantial and harmful discrimination by both government and private actors. *See generally* William B. Rubenstein, *Sexual Orientation And The Law* (2d ed.1997). This history and its present manifestations include brutal hate-motivated crimes against gay men and lesbians merely because of their sexual orientation, creating a climate of fear and silence even among many who are not victims. *See* Enhancement Act of 2001, S. Rep. No. 107-147, at 6 (2002). Gay men and lesbians are targeted and grouped together by a characteristic that "bears no relation to [their] ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Moreover, this group's political power has been limited by its size and by discriminatory sentiment in the halls of government, as elsewhere. Some States have responded with anti-

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[21] This is not to say that morality never has a place in informing and justifying legislative enactments. Equal protection limits arise, however, when morality is discriminatory and not even-handed, and when no other legitimate state concern – solely a negative value judgment by the majority – stands behind a law.

discrimination laws, and various hate-crime statutes have also been passed, to ensure that gay citizens, too, receive the equal protection of the laws. But state-sponsored discrimination is far from eradicated, as demonstrated both by the law at issue here and by Colorado's Amendment 2 struck down in *Romer*, to name just two examples. Given this history of discrimination, laws like the Homosexual Conduct Law should be scrutinized with greater skepticism than applies under the rational basis test. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996) (heightened scrutiny appropriate given history of discrimination); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).[22]

II. The Court Should Reconsider *Bowers* and the Critically Important Question Whether Criminalization of Consensual Adult Sexual Intimacy Violates the Rights of Privacy and Due Process.

This case also presents the crucial question whether Texas goes too far by subjecting individuals to criminal penalties for private, adult sexual intimacy. Section 21.06 invades a uniquely intimate realm of personal autonomy, family, and relationships. *See Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 849-51 (1992). Texas here tramples on entrenched expectations of privacy that are central to personal dignity and are deeply valued and broadly shared – even by those who disapprove of the conduct

[22] In addition, the Homosexual Conduct Law uses a *sex*-based classification to accomplish its discrimination against same-sex couples, as the original panel decision in the court below recognized. App. 86a-92a. Petitioner Lawrence would not be guilty of a criminal offense if Petitioner Garner were a woman rather than a man (and vice versa). Laws that use gender to perpetuate traditional social roles are extraordinarily suspect and may stand only if supported by a "highly persuasive justification." *United States v. Virginia*, 518 U.S. at 531. Even more fundamentally, laws that make criminality turn on gender are repugnant. *Cf. McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring).

outlawed by the statute. The Court should grant *certiorari* to consider anew whether invasive and arbitrary laws of this sort impinge upon liberty and privacy, in violation of due process.

Bowers, of course, addressed parallel issues in the context of a gay man's declaratory judgment challenge to the Georgia sodomy law, which applied to all persons.[23] But much has changed since *Bowers*. *Cf. Atkins v. Virginia*, 122 S. Ct. 2242, 2243 (2002) ("Much has changed since [*Penry*]").[24] The doctrine of *stare decisis* – never an "inexorable command" and even less so in constitutional cases – should not operate to insulate *Bowers* from reconsideration. *Casey*, 505 U.S. at 854; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). This Court's supremacy means that no other tribunal has the power to reconsider *Bowers*, a case "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of th[e] decision[]," 501 U.S. at 828-29.

Bowers does not have any of the unique qualities of cases like *Miranda v. Arizona*, 384 U.S. 436 (1966), that have become imbedded in our "national culture." *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).[25] To the contrary, *Bowers* is out of

[23] *See Bowers*, 478 U.S. at 188 n.1. *But cf. id.* at 198 (Powell, J., concurring) (emphasizing understanding of Georgia sodomy law as "moribund" and that "respondent has not been tried, much less convicted and sentenced").

[24] *Atkins* involved the Eighth Amendment, which incorporates evolving standards of decency. Though defined using other standards, fundamental privacy rights are likewise not static. *See infra* at 26-27. The great change described below indicates the minimal weight that *stare decisis* concerns have here.

[25] Nor are there present here any economic or other reliance interests, nor any issues of statutory interpretation, that have led the Court to determine in other contexts that it is more important that the law "be settled than that it be settled right." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)

step with the vast majority of the States. At the time of Bowers, 24 States plus the District of Columbia still had sodomy laws. 478 U.S. at 194. Since Bowers, half of those jurisdictions have repealed their sodomy laws legislatively or invalidated them as contrary to the respective State's constitution, so that today 37 States plus the District of Columbia no longer criminalize adult, consensual sodomy.[2] "The unmistakable trend . . . nationally . . . is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom." Ivgiy, 2002 Ark. LEXIS 401, at *66-*67 (Brown, J., concurring). But 13 States, including Texas, still have such laws, necessitating review by this Court. See supra at 4 & note 4.

The "consistency of the direction of change," Atkins, 122 S. Ct. at 2243, among the States is indicative of a strong national consensus reflecting profound judgments about the limits of government's intrusive powers in a civilized society. To Americans, nothing is more personal and private than sexual

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(quotation marks and citation omitted).

[2] Repeal or invalidation of same-sex-only sodomy laws since Bowers: 1993 Nev. Stat. 236 (repealing Nev. Rev. Stat. § 201.193); Ivgiy, 2002 Ark. LEXIS 401 (Arkansas); Wasson, 842 S.W.2d 487 (Kentucky); Gryczan, 942 P.2d 112 (Montana); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996), appeal denied (Tenn. June 10, 1996 and Sept. 9, 1996).

Repeal or invalidation of general sodomy laws since Bowers: 2001 Ariz. Legis. Serv. 382 (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10-14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); Powell v. State, 510 S.E.2d 18 (Ga. 1998); Williams v. Glendening, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998); Michigan Org. for Hum. Rights v. Kelly, No. 88-818820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990); Doe v. Ventura, No. MC 01-489, 2001 WL 543734 (Minn. 4th Dist. May 15, 2001). In Maryland, Michigan, and Minnesota, the States did not appeal the lower court decisions striking down the laws.

relations between consenting adults behind closed doors. As this case demonstrates, sodomy laws permit gross invasions of privacy and impose public humiliations that are an affront to personal dignity. Enforcement of such laws involves police tactics – including inspections of the specific physical details of sexual conduct to verify criminal violations – that are repugnant to any system of ordered liberty. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

As Arizona Governor Jane Hull said in signing the bill repealing Arizona's sodomy law: "At the end of the day I returned to one of my most basic beliefs about government: It does not belong in our private lives." Howard Fischer, Hull OKs Repeal of 'Archaic' Sex Laws Unenforced Ban on Sodomy, Ariz. Daily Star, May 9, 2001, at A1. Similarly, when the Georgia Supreme Court struck down, under the state constitution, the very law upheld by this Court in Bowers, it stated: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." Powell v. State, 510 S.E.2d 18, 24 (Ga. 1998); see also Gryczan, 942 P.2d at 122 ("[A]ll adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation").[3]

These decisions reflect expectations of liberty and privacy that are foundational to the relationship between government and free citizens. See Bowers, 478 U.S. at 217 (Stevens, J.,

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[3] See also Powell, 510 S.E.2d at 22 (right of privacy is "ancient law," derived from "the Roman's conception of justice" and natural law) (quotation marks omitted); Gryczan, 942 P.2d at 121-22 (right of privacy is "essential to the well-being of a free society"); Campbell, 926 S.W.2d 250, 261-62 & nn.9, 10, 11 (tracing historical foundation of sanctity of home and right of privacy).

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dissenting). Indeed, while Bowers pointed to state laws as evidence that proscriptions of sodomy comport with our Nation's traditions, *see id.* at 192-94, subsequent authoritative rulings from state courts have established the contrary principle: such laws violate ancient and fundamental rights guaranteed by the States to their citizens. *See, e.g.*, Powell, 510 S.E.2d at 22; Gryczan, 942 P.2d at 125-26; Wasson, 842 S.W.2d at 494-95; Campbell v. Sundquist, 926 S.W.2d 250, 261-62 (Tenn. App. 1996), *appeal denied* (Tenn. June 10, 1996 and Sept. 9, 1996).

Bowers has been criticized for characterizing the right at issue *in narrow, group-based terms, i.e.*, "whether the Federal Constitution confers a fundamental right upon homosexuals to engage *in sodomy*," 478 U.S. at 190. *See, e.g.*, Jed Rubenfeld, The Right of Privacy, 102 Harv. L.R. 737, 742-49 (1989). The Court's unusual approach was widely interpreted as sanctioning discrimination against gay and lesbian people. Romer, 517 U.S. at 641 (Scalia, J., dissenting) ("As the [D.C. Circuit] has aptly put it [*in* Padula v. Webster, 822 F.2d 97, 103 (1987)]: 'If the Court [*in* Bowers] was *unwilling* to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious'"). The Bowers methodology has inexorably led to "erroneous decisions as a consequence," Casey, 505 U.S. at 858, counseling reconsideration.

Since Bowers, of course, the Court's substantive due process cases have continued to consider relevant history and tradition *in determining the existence of a fundamental right*, e.g., Glucksberg, 521 U.S. at 720-23, but the Court has not confined its view of the liberties substantively guarded by the Due Process Clause to historical practices examined at the most specific level. Casey, 505 U.S. at 848-50 (*opinion of Court*); County of Sacramento

v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., joined by O'Connor, J., concurring) ("history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry"); Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., joined by Kennedy, J., concurring *in part*).

Also since Bowers, the Court has more forcefully recognized the constitutional dimension of privacy *in the home* and comparable settings. "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." Kyllo v. United States, 533 U.S. 27, 37 (2001) (emphasis *in original*); Minnesota v. Olson, 495 U.S. 91, 98 (1990) (overnight guest receives protection under "everyday expectations of privacy that we all share"). Consensus expectations about the limits of government intrusion into private, adult sexual intimacies, especially in the home, provide the kind of "objective considerations," Lewis, 523 U.S. at 858 (Kennedy, J., joined by O'Connor, J., concurring), that undergird a principled approach to the Due Process Clause. See also Stanley v. Georgia, 394 U.S. 557 (1969); Griswold, 381 U.S. at 484.

Moreover, Bowers has been undermined by Romer. The holding *in* Bowers that the "the presumed belief of a majority of the electorate *in* Georgia that homosexual sodomy is immoral and unacceptable" sufficed to sustain the Georgia law, 478 U.S. at 196 (emphasis added), is in tension with Romer's holding that gay men and lesbians may not be arbitrarily singled out for disfavored legal status, Romer, 517 U.S. at 633; see also id. at 641 (Scalia, J., dissenting). This inconsistency should be resolved by the Court. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law").

The underpinnings of *Bowers* have been substantially eroded in yet another crucial way. *Bowers* rested in large part on the notion that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." 478 U.S. at 191. Since 1986, however, the country has developed a more accurate understanding of gay and lesbian couples and families – neighbors, friends, relatives, and coworkers who live their lives more openly. Even using methods expected to undercount the relevant population, for example, the 2000 United States Census measured more than 600,000 households of unmarried same-sex partners nationally, including almost 43,000 in Texas, the third highest state total. David M. Smith and Gary J. Gates, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households at 1-2 and Table 1 (August 21, 2001), available at http://www.hrc.org/familynet/documents/LGcensus.pdf. These families live in 99.3% of American counties. Id. at 2, Table 4.

Many State and local governments and thousands of employers have enacted domestic partner or more extensive protections for unmarried couples. See Employers That Offer Domestic Partner Benefits, available at http://www.hrc.org/worknet/dp/index.asp. These efforts bear witness to American society's deepened familiarity with and respect for these committed relationships. See also Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (June 24, 2002) (named after gay New York firefighter chaplain who lost his life in September 11 terrorist attacks, law allows federal death benefits to surviving same-sex partners); Alia Ibrahim, District Registers Domestic Partners: Congress Blocked Law for 10 Years, Wash. Post, July 9, 2002, at B1. Every State (except Florida) permits gay men and lesbians to

adopt children individually, jointly and/or through "second-parent adoptions" that are analogous to stepparent adoptions. See, e.g., American Academy of Pediatrics, Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 339 (Feb. 2002). Many thousands of gay and lesbian partners are protected as the joint legal or de facto parents of children they are raising together, and many gay people provide foster homes to needy children.

These changes are part of a broader current recognized by the Court after *Bowers*: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000); id. at 85 (*Stevens, J., dissenting*); id. at 98-101 (*Kennedy, J., dissenting*); see also *Michael H.*, 491 U.S. at 124 n.3 (plurality) ("The family unit accorded traditional respect in our society . . . includes the household of unmarried parents and their children").

For adults in gay and lesbian families, as in all families, sexual intimacy is a basic component of stable, healthy relationships.[a] The Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life." *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545-46

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[a] Persons not in committed relationships have the same fundamental rights as those who are. "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . ." *Casey*, 505 U.S. at 898; see also id. at 896 (extolling "the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person") (quotation marks omitted).

(1987) (internal quotation marks omitted). Of course, this case does not present questions concerning formal recognition or affirmative support of gay and lesbian couples and their children. The question here is whether States may criminally punish private, consensual, sexual conduct.

The idea that a State may enter into American bedrooms and closely inspect the most intimate and private physical interactions, or give its police officers unbridled discretion to arrest disfavored minorities for engaging in consensual sexual activity, is a stark affront to fundamental liberty that the Court should end. Much has changed since Bowers, but both same-sex and broader sodomy laws persist – and have resisted full eradication. Bowers itself has been used to perpetuate and even expand inequities for gay and lesbian people. These consequences of Bowers are not what stare decisis exists to defend, but rather explain the need for the Court's intervention.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

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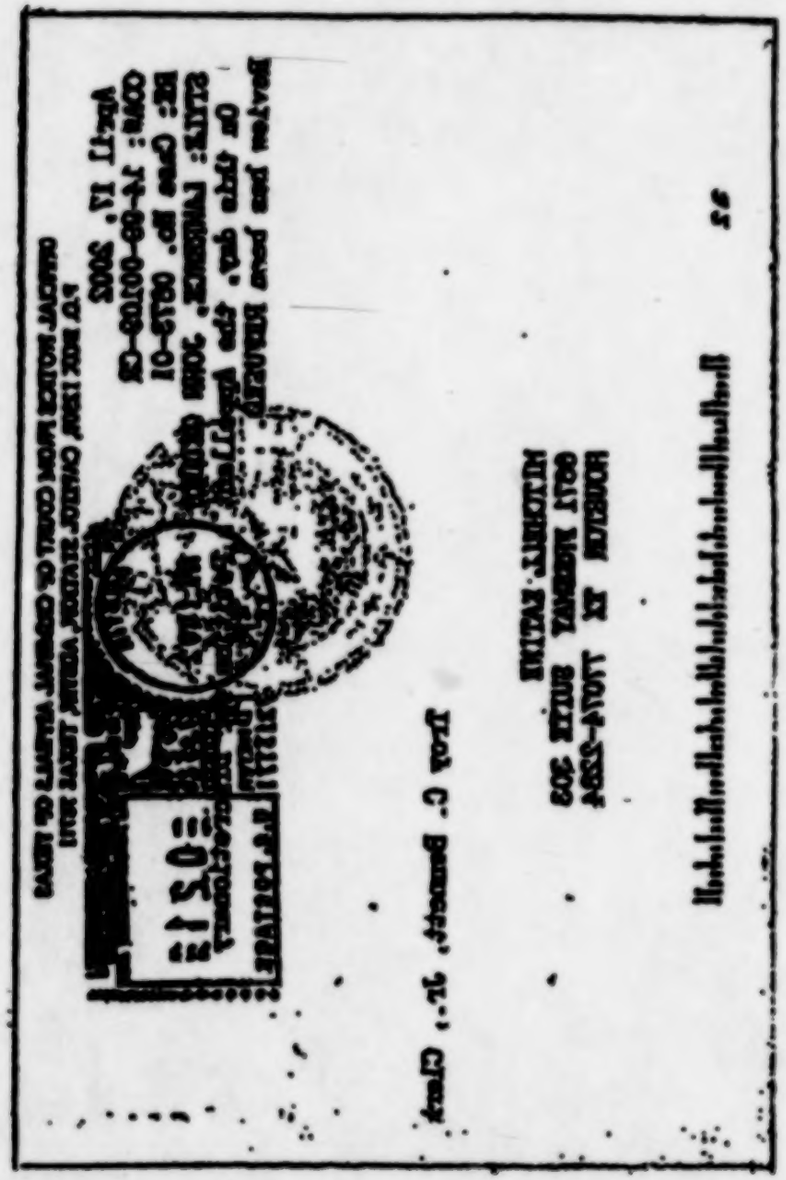
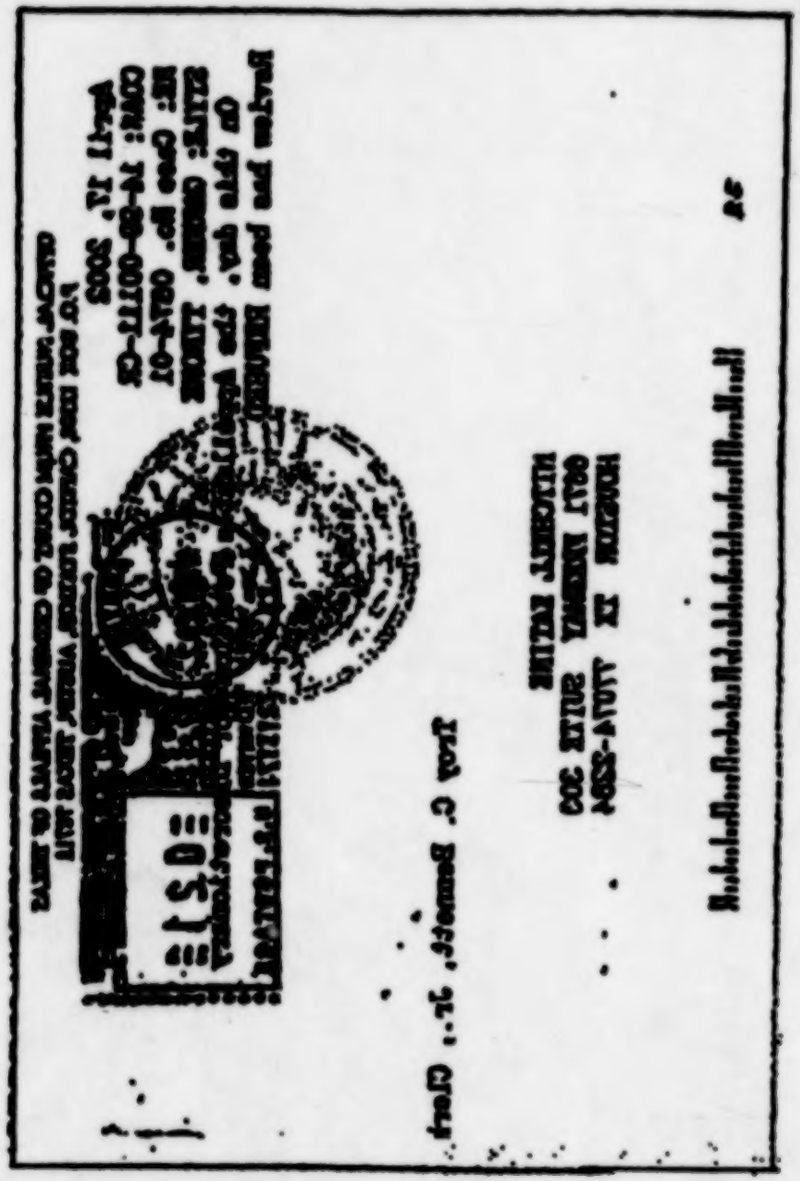
Dated: July 16, 2002

APPENDICES

Appendix A





Appendix C

[41 S.W.3d 349]

Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The
Fourteenth Court of Appeals

NOS. 14-99-00109-CR & 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 & 98-48531

MAJORITY OPINION

[41 S.W.3d at 350]

Appellants, John Geddes Lawrence and Tyron Garner, were convicted of engaging in homosexual conduct. They were each assessed a fine of two hundred dollars. On appeal, appellants challenge the constitutionality of Section 21.06 of the Texas Penal Code, contending it offends the equal protection and privacy guarantees assured by both the state and federal constitutions. For the reasons set forth below, we find no constitutional infringement.

While investigating a reported "weapons disturbance," police entered a residence where they observed appellants engaged in deviate sexual intercourse.[1] It is a Class C misdemeanor in the State of Texas for a person to engage "in deviate sexual intercourse with another individual of the same sex." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). However, because appellants subsequently entered pleas of *nolo contendere*, the facts and circumstances of the offense are not in the record. Accordingly, appellants did not challenge at trial, and do not contest on appeal, the propriety of the police conduct leading to their discovery and arrest. Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional.

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[1] "Deviate sexual intercourse" is defined in Texas as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).

EQUAL PROTECTION

In their first point of error, appellants contend Section 21.06 violates federal and state equal protection guarantees by discriminating both in regard to sexual orientation and gender.[2]

[41 S.W.3d at 351]

The universal application of law to all citizens has been a tenet of English common law since at least the Magna Carta, and our whole system of law is predicated on this fundamental principle. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). Nevertheless, our federal constitution did not originally contain an express guarantee of equal protection. While an assurance of equal protection could be implied from the Due Process Clause of the Fifth Amendment, this rudimentary guarantee was complicated by constitutional distinctions between "free"

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[2]Appellants rely upon the Fourteenth Amendment of the United States Constitution and two provisions of the Texas Constitution, namely, Article I, sections 3 and 3a:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.

TEX. CONST. art. I, § 3.

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

TEX. CONST. art. I, § 3a.

persons and persons "held to service or labour." U.S. CONST. arts. I, § 2 & IV, § 2.[3]

Although the constitution did not establish or legalize slavery, it certainly recognized its existence within the states which tolerated it. *See The Amistad*, 40 U.S. 518, 551 (1841). This constitutional recognition of slavery undoubtedly facilitated a union of the original colonies, but it postponed until a later day a resolution of the tension between involuntary servitude and the concept of equal protection of laws implied by the Fifth Amendment.[4] Reconciling the institution of slavery with the notion of equal protection ultimately proved to be impossible. In the end, a constitutional "clarification" was obtained by the force of arms, six hundred thousand lives, and two constitutional amendments.

In 1863, while the outcome of the Civil War remained very much in doubt, President Lincoln issued his Emancipation Proclamation purporting to free slaves found within the confederate states. In 1865, just months after general hostilities had ended, the Thirteenth Amendment was adopted. It declared that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The abolition of slavery, however, was not immediately effective in bestowing the equal protection of law upon all persons. Several centuries

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[3] These articles were subsequently amended by the Thirteenth and Fourteenth Amendments.

[4] The Due Process Clause of the Fifth Amendment "requires that every man shall have the protection of his day in court, and the benefit of the general law . . . so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." U.S. CONST. amend. V.

of slavery had instilled a deep cultural bias against people of color. Individual southern states began enacting the so-called Black Codes which were designed to repress their black citizens and very nearly resurrect the institution of slavery. *City of Memphis v. Greene*, 451 U.S. 100, 132 (1981) (White, J., concurring). In response to these events, the Republican Congress passed the Civil Rights Act of 1866 in an attempt to ensure equal rights for former slaves. *General Bldgs. Contrs. Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). In 1868, the Fourteenth Amendment was adopted and its Equal Protection Clause enjoined the states from denying to any person the equal protection of the laws.

Thus, the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). While the guarantees of "equal protection" and "due process **[41 S.W. 3d at 352]** of law" may overlap, the spheres of protection they offer are not coterminous. *Truax*, 257 U.S. at 332, 42 S.Ct. at 129. Rather, the right to "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law.'" *Bolling*, 347 U.S. 497, 499 (1954). It is aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. *See Truax*, 257 U.S. at 332-33, 42 S.Ct. at 129. It was not intended, however, "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

Similarly, Article I, § 3 of the Texas Constitution also guarantees equality of rights to all persons. *Burroughs v. Lyles*, 181 S.W.2d 570, 574 (Tex. 1944). It was designed to prevent any person, or class of persons, from being singled out as a

special subject for discriminating or hostile legislation. *Id.* Because the state and federal equal protection guarantees share a common aim and are similar in scope, Texas cases have frequently followed federal precedent when analyzing the scope and effect of Article I, § 3. *Hogan v. Hallman*, 889 S.W.2d 332, 338 (Tex. App.—Houston [14 th Dist.] 1994, writ denied).

The Texas Equal Rights Amendment, however, has no federal equivalent. *See* TEX. CONST. art. I, § 3a. When Texas voters adopted it in 1972 by a four to one margin, both the United States and Texas constitutions already provided due process and equal protection guarantees. *In the Interest of McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Thus, unless the amendment was an exercise in futility, it must have been intended to be more extensive and provide greater specific protection than either the United States or Texas due process and equal protection guarantees. *Id.*

All of the aforementioned state and federal guarantees of equal protection are tempered somewhat by the practical reality that the mere act of governing often requires discrimination between groups and classes of individuals. *Casarez v. State*, 913 S.W.2d 468, 493 (Tex. Crim. App. 1994). A state simply cannot function without classifying its citizens for various purposes and treating some differently than others. *See Sullivan v. U.I.L.*, 616 S.W.2d 170, 172 (Tex. 1981). For example, able-bodied citizens may be required to serve in the armed forces, while the infirm are not. *Casarez*, 913 S.W.2d at 493.

The conflict between the hypothetical ideal of equal protection and the practical necessity of governmental classifications has spawned a series of judicial tests for determining when classifications are and are not permissible. The general rule is that legislation is presumed to be valid and

will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The general rule gives way, however, when a statute classifies persons by race, alienage, or national origin. *Id.* These factors are so seldom relevant to the achievement of any legitimate state interest that laws separating persons according to these "suspect classifications" are subject to strict scrutiny. *Id.* Accordingly, laws directed against a "suspect class," or which infringe upon a "fundamental right," will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.*; *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988).

[41 S.W. 3d at 353]

Sexual Orientation

Relying on the Fourteenth Amendment of the United States Constitution, Article I, § 3 of the Texas Constitution, and the Texas Equal Rights Amendment, appellants contend that Section 21.06 of the Texas Penal Code unconstitutionally discriminates against homosexuals.[5] In other words, the statute improperly punishes persons on the basis of their sexual orientation.

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[5] There is some authority recognizing a distinction between homosexual orientation and homosexual conduct. *Meinhold v. United States Dept. of Defense*, 34 F.3d 1469, 1477 (9 th Cir. 1994); *Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9 th Cir. 1991); *see also Watkins v. United States Army*, 875 F.2d 699, 725 (9 th Cir. 1989) (Norris, J., concurring) (stating that "any attempt to criminalize the status of an individual's sexual orientation would present grave constitutional problems").

The threshold issue we must decide is whether Section 21.06 distinguishes persons by sexual orientation. On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual "orientation." Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct.[6] Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation.

However, a facially neutral statute may support an equal protection claim where it is motivated by discriminatory animus and its application results in a discriminatory effect. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1997). Appellants contend this discriminatory intent is evident in the evolution of Section 21.06. For most of its history, Texas has deemed deviate sexual intercourse, i.e., sodomy, to be unlawful whether performed by

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[6] In his study of human sexuality, Dr. Alfred C. Kinsey classified the "sexual orientation" of his subjects on a seven point continuum: (1) exclusively heterosexual; (2) predominantly heterosexual, only incidentally homosexual; (3) heterosexual, but more than incidentally homosexual; (4) equally heterosexual and homosexual; (5) predominantly homosexual, but more than incidentally heterosexual; (6) predominantly homosexual, but incidentally heterosexual; and (7) exclusively homosexual. Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 58 (1991). Kinsey estimated that approximately 50 per cent of the population is exclusively heterosexual; 4 per cent is exclusively homosexual. *Id.* at 64. *See also* Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65, 83-84 (1997); Odeana R. Neal, *The Limits of Legal Discourse: Learning From the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 705 (1996).

persons of the same or different sex.[7] In 1973, however, the Legislature repealed its prohibition of sodomy generally, except when performed by persons of the same sex. Because "homosexual sodomy" is unlawful, while "heterosexual sodomy" is not, appellants contend the statute evidences a hostility toward homosexuals, not shared by heterosexuals.

While we find this distinction may be sufficient to support an equal protection claim, neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a "suspect **[41 S.W. 3d at 354]** class."[8] Thus, the prohibition of homosexual sodomy is permissible if it is rationally related to a legitimate state interest.

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[7] *See* Acts 1943, 48 th Leg., p. 194, ch.112, § 1; Vernon's Ann. P.C. (1925) art. 524; Rev. P.C. 1911, art. 507; Rev. P.C. 1895, art. 364; and Rev.P.C.1879, art. 342.

[8] The Ninth Circuit Court of Appeals briefly held that homosexuals constitute a "suspect class," but that opinion was later withdrawn. *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990). No other federal court of appeals has ever applied heightened scrutiny when considering equal protection claims in the context of sexual orientation. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (all holding that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes).

See also Romer v. Evans, 517 U.S. 620, 631-32 (1996) (relying on the "rational relationship" test rather than "strict scrutiny" when assessing the constitutionality of Colorado's Second Amendment barring legislation favorable to homosexuals).

The State contends the statute advances a legitimate state interest, namely, preserving public morals. One fundamental purpose of government is "to conserve the moral forces of society." *Grigsby v. Reib*, 105 Tex. 597, 607, 153 S.W. 1124, 1129 (Tex. 1913). In fact, the Legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral. Even our civil law rests on concepts of fairness derived from a moral understanding of right and wrong. The State's power to preserve and protect morality has been the basis for upholding such diverse statutes as requiring parents to provide medical care to their children,[9] prohibiting the sale of obscene devices,[10] forbidding nude dancing where liquor is sold,[11] criminalizing child endangerment,[12] regulating the sale of liquor,[13] and punishing incest.[14] Most, if not all, of our law is "based on notions of morality." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

Appellants claim the concept of "morality" is simply "the singling out [of] groups of people based on popular dislike

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[9] *Commonwealth v. Nixon*, 2000 WL 1741296, *5 (Pa. Nov. 27, 2000).

[10] *Yorko v. State*, 690 S.W.2d 260, 265-66 (Tex. Crim. App. 1985).

[11] *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1237-38 (R.I. 2000).

[12] *State v. Wilson*, 987 P.2d 1060, 1067 (Kan. 1999).

[13] *Altshuler v. Pennsylvania Liquor Control Bd.*, 729 A.2d 1272, 1277 (Pa. Commw. Ct. 1999).

[14] *Smith v. State*, 6 S.W.3d 512, 519-20 (Tenn. Crim. App. 1999).

or disapproval." Contending this practice was specifically condemned in *Romer v. Evans*, appellants argue that classifications based on sexual orientation can no longer be rationally justified by the State's interest in protecting morality. 517 U.S. 620 (1996). We find, however, that appellant's broad interpretation of *Romer* is not supported by the text or rationale of the Court's opinion.

In *Romer*, the Supreme Court considered the constitutionality of Colorado's universal prohibition of any statute, regulation, ordinance, or policy making homosexual orientation the basis of any claim of minority status, quota preferences, protected status, or claim of discrimination. Justice Kennedy, writing for the majority, first observed that the Fourteenth Amendment does not give Congress a general power to prohibit discrimination in public accommodations. *Id.* at 627-28. Thus, discrimination in employment, **[41 S.W. 3d at 355]** accommodations, and other commercial activities has historically been rectified by the enactment of detailed statutory schemes. *Id.* at 628. The Court cited, for illustration, several municipal codes in Colorado that prohibited discrimination on the basis of age, military status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability, or sexual orientation. *Id.* at 629. To the extent these codes protected homosexuals, however, they were rendered invalid by Colorado's constitutional amendment.

In striking down the amendment, the Supreme Court declared that all citizens have the right to petition and seek legislative protection from their government. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. "A State cannot . . . deem a class of persons a stranger to its laws." *Id.* at 635. Thus, while no individual,

class, or group is guaranteed success, all persons have the right to *seek* legislation favoring their interests.

Here, appellants do not suggest that Section 21.06 unconstitutionally encumbers their right to seek legislative protection from discriminatory practices. Hence, *Romer* provides no support for appellants' position. *Romer*, for example, does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.[15]

Moreover, while appellants may deem the statute to be based on prejudice, rather than moral insight, our power to review the moral justification for a legislative act is extremely limited. The constitution has vested the legislature, not the judiciary, with the authority to make law. In so doing, the people have granted the legislature the exclusive right to determine issues of public morality.[16] If a court could **[41 S.W.**

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[15] In fact, the State of Colorado did not cite the preservation of morality as one of its legitimate interests in attempting to uphold the amendment. Rather, the state argued that it had a legitimate interest in: (1) protecting the freedom of association of its citizens, particularly those who might have personal or religious objections to homosexuality, and (2) conserving its resources to combat discrimination against other groups. *Id.* at 635.

[16] Where a statute does not run afoul of explicit constitutional protections, its moral justification is virtually unreviewable by the judiciary. When the rational basis for an Alabama statute outlawing certain sexual devices was challenged, the United States Eleventh Circuit Court of Appeals wro[illegible]:

3d at 356] overturn a statute because it perceived nothing wrong with the prohibited conduct, the judiciary would at once become the rule making authority for society—this the people have strictly forbidden. Accordingly, we must assume for the purposes of our analysis that the Legislature has found homosexual sodomy to be immoral.

The State also contends the legislature could have rationally concluded that "homosexual sodomy" is a different, and more reprehensible, offense than "heterosexual sodomy." This proposition is difficult to confirm because in American jurisprudence courts and legislatures have historically discussed the topic only in terms of vague euphemisms. In fact, statutes often made sodomy a criminal offense without ever defining the

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However misguided the legislature of Alabama may have been in enacting the statute challenged in this case, the statute is not constitutionally irrational under rational basis scrutiny because it is rationally related to the State's legitimate power to protect its view of public morality. "The Constitution presumes that ... improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979). This Court does not invalidate bad or foolish policies, only unconstitutional ones; we may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

For the foregoing reasons, we hold the Alabama statute challenged in this case has a rational basis.

Williams v. Pryor, 229 F.3d 1331, 1339 (11 th Cir. 2000).

conduct. *See Commonwealth v. Poindexter*, 118 S.W. 943, 944 (Ky. 1909).

In its broadest common law form, the offense "consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman; or by man or woman, in any manner, with beast." *Prindle v. State*, 21 S.W. 360 (Tex. Crim. App. 1893). More restrictive definitions of sodomy, however, were commonly recognized. In many instances, for example, sodomy was restricted to carnal copulation between two human beings—sometimes further restricted to males (perhaps because it was difficult to "imagine that such an offense would ever be committed between a man and a woman"). *Wise v. Commonwealth*, 115 S.E. 508, 509 (Va. 1923). In any event, only homosexual conduct between *two men* was included among the early capital crimes of the Massachusetts Bay Colony.[17] Moreover, in some jurisdictions, including Texas, sodomy did not include oral sex. *Prindle*, 21 S.W. at 360; *Poindexter*, 118 S.W. at 944. Again, it is difficult to know whether this more narrow definition arose deliberately or was simply the product of legislative ignorance and/or judicial innocence. Conceivably, oral sex was "so unusual and unthinkable as perhaps not to have been even contemplated in the earlier stages of the law." *Wise*, 115 S.E. at 509.

Regardless of how these differing definitions of sodomy arose, we agree with the State's general contention that it has always been the legislature's prerogative to deem some acts more egregious than others. For example, the legislature has not chosen to make every homicide a capital offense; depending

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[17] Bestiality, however, was a capital offense whether committed by a man or a woman. THE LAWS AND LIBERTIES OF MASSACHUSETTS, at 5 (Cambridge 1648).

upon the circumstances, some homicides are first degree felonies,[18] some are second degree felonies,[19] some are state jail felonies,[20] and others are lawful.[21] Moreover, it is the duty of this Court to construe every statute in a manner that renders it constitutional if it is possible to do so consistent with a reasonable interpretation of its language. *Trinity River Authority v. UR Consultants, Inc. Texas*, 869 S.W.2d 367, 370 (Tex. App.—Dallas 1993), *aff'd*, 889 S.W.2d 259 (Tex. 1994). Accordingly, we find the legislature could have concluded that deviant sexual intercourse, when performed by members of the same sex, is an act different from or more offensive than **[41 S.W. 3d at 357]** any such conduct performed by members of the opposite sex.

Because (1) there is no fundamental right to engage in sodomy, (2) homosexuals do not constitute a "suspect class," and (3) the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals, appellant's first contention is overruled.

Gender

Appellants also contend Section 21.06 unconstitutionally discriminates on the basis of gender. In

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[18] TEX. PEN. CODE ANN. § 19.02 (Vernon 1994).

[19] TEX. PEN. CODE ANN. § 19.04 (Vernon 1994).

[20] TEX. PEN. CODE ANN. § 19.05 (Vernon 1994).

[21] TEX. PEN. CODE ANN. §§ 9.32, 9.33, 9.42, & 9.43 (Vernon 1994)

Texas, gender is recognized as a "suspect class." *Barber v. Colorado Independent School Dist.*, 901 S.W.2d 447, 452 (Tex. 1995). In light of the Texas Equal Rights Amendment, classifications by gender are subject to "strict scrutiny" and will be upheld only if the State can show such classifications have been suitably tailored to serve a compelling state interest.[22]

Appellants claim Section 21.06 discriminates on the basis of sex because criminal conduct is determined to some degree by the gender of the actors. For example, deviate sexual intercourse is not unlawful *per se* in Texas. While the physical act is not unlawful as between a man and woman, it is unlawful when performed between two men or two women. Appellants contend that because criminality under the statute is, in some respects, gender-dependent, Section 21.06 runs afoul of state and federal equal protection guarantees.

The State asserts the statute applies equally to men and women, i.e., two men engaged in homosexual conduct face the same sanctions as two women. Thus, the State maintains the statute does not discriminate on the basis of gender. Appellants respond by observing that a similar rationale was expressly rejected in the context of racial discrimination. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

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[22] Under the Fourteenth Amendment, gender classifications are analyzed according to an intermediate "heightened scrutiny" falling somewhere between the rational relationship test and strict scrutiny. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that under the Fourteenth Amendment, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives).

In *Loving*, the State of Virginia attempted to uphold its miscegenation statute in the face of an equal protection challenge by arguing that the statute did not discriminate on the basis of race because it applied equally to whites and blacks. The Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "[p]enalties for miscegenation arose as an incident to slavery." *Loving*, 388 U.S. at 6. Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional. *Id.*, at 10.

Here, the State of Texas employs a comparable argument, namely, Section 21.06 does not discriminate on the basis of gender because it applies equally to men and women. Appellants' contend the argument was discredited by *Loving* and should not be followed here. But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we find **[41 S.W. 3d at 358]** nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find appellants' reliance on *Loving* unpersuasive.[23]

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[23] *See also Boutwell v. State*, 719 S.W.2d 164 (Tex. Crim. App. 1985). There the Court of Criminal Appeals considered the applicability of the Texas Equal Rights Amendment to Section 21.10 of the Penal Code which, until its repeal in 1983, provided legal defenses to certain heterosexual acts that were specifically denied in the context of homosexual acts. Act of May 24, 1973, 63 rd Leg., R.S., ch. 399, § 21.10, 1973 Tex. Gen. Laws 918. When Boutwell was charged with sexual abuse of several boys, he argued the statute was unconstitutional under the Texas Equal Rights Amendment because it discriminated against him on the basis of sex. *Boutwell*, 719 S.W.2d at 167. The Court of Criminal Appeals rejected the contention, stating:

> But clearly, a female defendant situated similarly to appellant—that is, a female who had engaged in deviate sexual intercourse with a child 14 years or older who was of the same sex—would likewise be denied the "promiscuity" defense under § 21.10. Thus, appellant's reasoning proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of "sex" in the sense of "gender;" but rather, that his "sex" *act* is entitled to protection equal to that given heterosexual conduct under the law as stated in § 21.10(b).

Id. at 169; *see also Boulding v. State*, 719 S.W.2d 333 (Tex. Crim. App. 1986).

Boutwell has been severely criticized, but on grounds different than those at issue here. *McGlothlin v. State*, 848 S.W.2d 139, 138 (Tex. Crim. App. 1992); *Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992).

While Section 21.06 alludes to sex, not every statutory reference to gender constitutes an unlawful "gender-classification." Texas law provides, for example, that counties are authorized to increase participation by *"women-owned* businesses" in public contract awards by establishing a contract percentage goal for those businesses;[24] when jurors are sequestered overnight, separate facilities must be provided for *male* and *female* jurors;[25] employers are prohibited from permitting, requesting, or requiring *female* children to work

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[24] TEX. LOC. GOV'T. CODE ANN. § 381.004 (Vernon 1999).

[25] TEX. CODE CRIM. PROC. ANN. art. 35.23 (Vernon Supp. 2000).

topless;[26] the Director of the Texas Department of Transportation must report to each house of the legislature regarding the department's progress in recruiting and hiring *women*;[27] where a child is adopted by two parents, one must be *female* and the other *male*;[28] *female* patients being transported from a jail to a mental health facility must be accompanied by a *female* attendant;[29] circumcision of a *female* under the age of 18 is unlawful;[30] etc. Whether these and many other gender-specific statutes, violate the Texas Equal Rights Amendment is not before us. We must assume, however, that the legislature enacted these provisions with full knowledge of Article I, **[41 S.W. 3d at 359]** section 3a of the Texas Constitution and perceived no conflict. The legislature, for example, has specifically admonished the governor and supreme court to ensure the full and fair representation of women when making their appointments to the Board of Directors of the State Bar of Texas, but to also make no "regard to race, creed, sex, religion, or national origin." TEX. GOV'T CODE ANN. § 81.020 (Vernon 1998).

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[26] TEX. PEN. CODE ANN. § 43.251 (Vernon 1994).

[27] TEX. TRANS. CODE ANN. § 201.403 (Vernon 1999).

[28] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon Supp. 2000).

[29] TEX. CODE CRIM. PROC. ANN. art. 46.04 (Vernon Pamph. 2000).

[30] TEX. HEALTH & SAFETY CODE ANN. § 166.001 (Vernon Supp. 2000).

The legislature has mistakenly designated two different statutes as Section 166.001of the Health and Safety Code. Act of May 18, 1999, 76th Leg., R.S., ch. 450, § 1.02, 1999 Tex. Gen. Laws 2835 (Advance Directives Act) and Act of May 26, 1999, 76 th Leg., R.S., ch. 642, § 1, 1999 Tex. Gen. Laws 3213 (Female Genital Mutilation Prohibited).

The mere allusion to gender is not a talisman of constitutional invalidity. If a statute does not impose burdens or benefits upon a particular gender, it does not subject individuals to unequal treatment. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (holding that while California's Proposition 209 mentions race and gender, it does not logically classify persons by race and gender); *see also Hayden v. County of Nassau*, 180 F.3d 42, 48-49 (2nd Cir. 1999) (entrance exam designed to diminish cultural bias on black applicants did not constitute a "racial classification" because it did not promote one race over another). While Section 21.06 includes the word "sex," it does not elevate one gender over the other. Neither does it impose burdens on one gender not shared by the other.

Where, as here, a statute is gender-neutral on its face, appellants bear the burden of showing the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose. *Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 819 (4th Cir. 1995); *Keevan v. Smith*, 100 F.3d 16 644, 650 (8th Cir. 1996). Appellants have made no attempt to establish, nor do they even contend, that Section 21.06 has had any disparate impact between men and women. Rather, appellants complain only that the statute has had a disparate impact between homosexuals and heterosexuals. While we recognize the statute may adversely affect the conduct of male and female homosexuals, this simply does not raise the specter of gender-based discrimination.

As we already have determined, the police power of a state may be legitimately exerted in the form of legislation where such statute bears a real and substantial relation to the public health, safety, morals, or some other phase of the general

welfare. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928). To the extent the statute has a disproportionate impact upon homosexual conduct, the statute is supported by a legitimate state interest. The first point of error is overruled.

PRIVACY

In their second point of error, appellants contend Section 21.06 violates the right to privacy guaranteed by both the state and federal constitutions. Appellants claim the intimate nature of the conduct at issue, when engaged in by consenting adults in private, is beyond the scope of governmental interference.

Neither the state nor federal constitutions contain an explicit guarantee of privacy. Thus, there is no general constitutional right to privacy. However, both constitutions contain express limitations on governmental power from which "zones of privacy" may be inferred. The United States Supreme Court has found five such zones in the Bill of Rights:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment. . .. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of **[41 S.W. 3d at 360]** the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self- Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to

> surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

Similarly, the Texas Supreme Court has found "constitutionally protected zones of privacy emanating from several sections of article I of the Texas Constitution." *City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996). These include: section 6, concerning freedom of worship; section 8, concerning freedom of speech and press; section 9, concerning searches and seizures; section 10, concerning the rights of an accused in criminal prosecutions; section 19, concerning deprivation of life, liberty and property, and due course of law; and section 25, concerning quartering soldiers in houses. *Id.*

Appellants do not specifically identify the constitutional provision which they claim creates a zone of privacy protecting consensual sexual behavior from state interference. However, we find there are but two provisions of the federal constitution which could arguably be construed to apply here—the Fourth and Ninth Amendments.

The Fourth Amendment is not applicable because appellants do not contest, and have never contested, the entry by police into the residence where they were discovered. Thus, we must assume the police conduct was both reasonable and lawful under the Fourth Amendment.

The Ninth Amendment also offers no support. In *Bowers v. Hardwick*, the defendants were convicted of violating the Georgia sodomy statute. 478 U.S. at 190-91. Relying upon

Griswold v. Connecticut[31] and other decisions recognizing "reproductive rights," the defendants argued that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity that encompasses homosexual sodomy. The court rejected the argument and said "the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Bowers*, 478 U.S. at 191.

Likewise, under the Texas Constitution, we perceive that there are but two provisions that would arguably support appellants' position—sections 9 and 19 of Article I. Again, because appellants have not challenged the search leading to their arrest, we must conclude the police did not violate section 9 of the Texas Constitution.

Although neither the Texas Supreme Court nor Texas Court of Criminal Appeals has considered whether section 19 creates a zone of privacy that would protect private homosexual behavior, the Supreme Court has held it does not protect private *heterosexual* behavior. In *City of Sherman v. Henry*, the court was confronted with a case where the city had denied a promotion to a police officer because he was having an adulterous affair with the wife of another officer. *See Henry* 928 S.W.2d at 465. The court held that Article I, section 19 does not create a right of privacy protecting adulterous conduct without state interference.

[41 S.W. 3d at 361]

> [S]exual relations with the spouse of another is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this

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[31] 381 U.S. 479 (1965).

> Nation's history and tradition." Prohibitions against adultery have ancient roots. In the latter half of the 17th century in England, adultery was a capital offense. 4 WILLIAM BLACKSTONE, COMMENTARIES *64. The common law brought to this country by the American colonists included the crime of adultery as previously defined by the canon law of England. *United States v. Clapox*, 35 F. 575, 578 (D.Or.1888); FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW vol. 11,§§ 1719-20, p. 524 (9th ed. 1885). Adultery was still considered a crime by courts and commentators in the latter half of the 19th century when the Fourteenth Amendment was ratified. *See Clapox*, 35 F. at 578; WHARTON, *supra*. In fact, adultery is a crime today in half of the states and the District of Columbia.
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> While other states, including Texas, have recently repealed laws criminalizing adultery, the mere fact that such conduct is no longer illegal in some states does not cloak it with constitutional protection.

Id. at 470.

Similarly, we find homosexual conduct is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." In America, homosexual conduct was classified as a felony offense from the

time of early colonization.[32] In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. *Bowers v. Hardwick*, 478 U.S. at 193. In Texas, homosexual conduct has been a criminal offense for well over a century.[33]

In addition to an American tradition of statutory proscription, homosexual conduct has historically been repudiated by many religious faiths.[34] Moreover, Western civilization has a long history of repressing homosexual behavior by state action. Under Roman law, Justinian states that a *lex Iulia* imposed severe criminal penalties against "those who indulge in criminal intercourse with those of their own sex."[35] Blackstone states that the "infamous crime against nature, committed either with man or beast" was a grave offense among the ancient Goths and that it continued to be so under English

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[32] *See* LAWS AND LIBERTIES 5 (Cambridge 1648) (collection of the general laws of the Massachusetts Bay Colony).

[33] *See* Tex. Penal Code art. 342 (1879); Tex. Penal Code art. 364 (1895); Tex. Penal Code art. 507 (1911); and Tex. Penal Code art. 524 (1925).

[34] "Our society's three major religions—Judaism, Christianity, and Islam—historically have viewed homosexuality as immoral." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 404 n.40 (1994) [citing The Jewish Torah (Leviticus 18:22, 20:13), the New Testament (Romans 1:26-28, I Timothy 1:9-10, I Corinthians 6:9-10) and the Koran (The Heights 7:80)].

[35] FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 205 (J. B. Moyle trans., 5 th ed., Oxford 1913).

common law at the time of his writing.[36] In his survey of the law, Montesquieu was prompted to conclude that "the crime against nature" is a "crime, which religion, morality, and civil government equally condemn."[37]

[41 S.W. 3d at 362]

Nevertheless, appellants contend that Texas should join several of our sister states who have legalized homosexual conduct. Certainly, the modern national trend has been to decriminalize many forms of consensual sexual conduct even when such behavior is widely perceived to be destructive and immoral, e.g., seduction, fornication, adultery, bestiality, etc.[38]

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[36] 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16.

[37] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Dublin 1751).

[38] Despite this trend, there are still to day many types of "private" conduct which courts have recognized are not protected from state interference. *See generally Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding there is no protected right to commit suicide); *Osborne v. Ohio*, 495 U.S. 103 (1990) (possession of child pornography not a protectable privacy interest even when possessed inside the home); *Bowers*, 478 U.S. at 195 (suggesting that adultery, even when committed in the home, is not a constitutionally protected behavior); *United States v. Miller*, 776 F.2d 978 (11 th Cir. 1985) (holding that constitutional right of privacy does not shield a person from personal possession of pornography outside the home); *Potter v. Murray City*, 760 F.2d 1065 (10 th Cir. 1985) (holding that because monogamy is inextricably woven into the fabric of our society, ban on plural marriage did not violate right of privacy); *United States v. Fogarty*, 692 F.2d 542 (8 th Cir. 1982) (holding there is no fundamental right to possess marijuana); *J.B.K., Inc. v. Caron*, 600 F.2d 710 (8 th Cir. 1979) (holding right of privacy does not extend to commercialized sexual activities); *Kuromiya v. United States*, 37 F. Supp.2d 717 (E.D. Penn. 1999) (holding there is no fundamental right to smoke marijuana).

Our concern, however, cannot be with cultural trends and political movements because these can have no place in our decision without usurping the role of the Legislature. While the Legislature is not infallible in its moral and ethical judgments, it alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good.[39]

Our role was aptly defined over a hundred years ago by Justice Noggle who, while writing for the Idaho Supreme Court, observed: "The court is not expected to make or change the law, but to construe it, and determine the power of the law and the power the legislature had to pass such a law; whether that power was wisely or unwisely exercised, can be of no

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[39] The fact that unlawful behavior is conducted in private between consenting adults may complicate detection and prosecution, but it does not, *ipso facto*, render its statutory prohibition unconstitutional. In upholding its sodomy statute, the Supreme Court of Louisiana wrote:

> The question of whether or not a third party is harmed by a consensual and private act of oral or anal sex is a debate which has been ongoing for many years and is nothing which this court needs to address. The legislature is within constitutional authority to proscribe its commission. Any claim that private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.
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> There has never been any doubt that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral. Simply put, commission of what the legislature determines as an immoral act, even if consensual and private, is an injury against society itself.

See State v. Smith, 766 So.2d 501, 509 (La. 2000).

consequence." *People v. Griffin*, 1 Idaho 476, 479 (1873). Because we find no constitutional "zone of privacy" shielding homosexual conduct from state interference, appellants' second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority, Consenting, and Dissenting Opinions filed March 15, 2001. (Justices Yates, Fowler, Edelman, Wittig, Frost, and Amidei join this opinion; **[41 S.W. 3d at 363]** Justice Yates also filed a concurring opinion in which Justices Hudson, Fowler, Edelman, and Frost join; Justice Fowler also filed a concurring opinion in which Justices Yates, Edelman, Frost, and Amidei join. Justice Anderson filed a dissenting opinion in which Senior Chief Justice Murphy joins.)*

En Banc.

Publish — TEX. R. APP. P. 47.3(b).

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* Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.

Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The
Fourteenth Court of Appeals

NO. 14-99-00109-CR & NO. 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 and 98-48531

CONCURRING OPINION
ON MOTION FOR REHEARING
EN BANC

[41 S.W. 3d at 363]

I agree with the result reached by, and reasoning utilized by, the majority opinion. However, I write separately only to address one of the arguments raised by amicus curiae. Amicus curiae alleges that by overruling the prior panel's decision, this Court will have succumbed to improper political pressure and asserts "[t]he best way for this Court to rebuke those who attempted to exercise improper political influence in the present case is to affirm the well-reasoned panel opinion."

The Texas Code of Judicial Conduct provides the guiding principals for every judge of this State in the performance of his or her judicial duties. TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998 & Supp. 2000). Each judge in Texas is instructed to "not be swayed by partisan interests, public clamor, or fear of criticism." *Id.* at Canon 3(B)(2). What amicus curiae requests this Court to do is, in effect, no different from what those who leveled political attacks against the majority in the panel opinion hoped to achieve, *i.e.*, a certain desired result.[1] In other words, amicus curiae asks this Court to shirk its bound duty in order to decide a difficult question of law differently from what it believes to be the correct resolution. Amicus curiae's request is grounded on the mistaken notion that any different result must surely be on the basis of political pressure, without crediting the members of this Court with the integrity to carry out their duties in strict accordance with the Texas Code of Judicial Conduct and with careful consideration of the legal issues presented in this appeal. As amicus curiae suggests, attacks on the judiciary, like the one

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[1] In its brief to this Court, amicus curiae describes the political attacks as including a "letter circulated by local [Republican party] officials in an attempt to influence the outcome of the case."

following the panel opinion, may have the effect of increasing the potential that the public's confidence in our courts will diminish because of a perception, however erroneous, that we have made a political decision, not a legal one. But the response to such a reckless and irresponsible act cannot be that we ignore our duty to decide the law we have been entrusted to interpret. Attempts to politicize this opinion—regardless of their origin—have no place in our decision making process, nor are attacks from opposing interests immune from creating the very same perception in the mind of the public that may now exist as a result of earlier inappropriate attempts to influence this decision.

"Judges are called upon to make hundreds of decisions each year. These decisions are made after consideration of opposing contentions, both of which are often based on reasonable interpretations of the laws of the United States and the Constitution." *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, 215 N.Y.L.J. 4 (March 29, 1996). Unless there is a basis for disqualification or recusal, all judges must decide the matter brought **[41 S.W. 3d at 364]** before them. TEX. CODE JUD. CONDUCT, Canon 3(B)(1); *Rogers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., responding to Justice Gammage's declaration of recusal) (citing *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 823–24 (Tex. 1972)). As one jurist has commented with regard to our duty to decide difficult matters presented to us:

> All judges face the likelihood of being publicly criticized . . . for decisions that they render. It goes with the territory. A judge's oath is to decide cases based on the law and the facts . . .
>
> .

Carl E. Stewart, *Contemporary Challenges to Judicial*

Independence, 43 LOY. L. REV. 293, 306 (1997). There is simply no place for suggesting that the members of this Court are pandering to certain political groups or deciding a case as a means to achieve a politically desired end.[2] And to do so only adds unnecessarily to the already politically charged climate created by the people amicus curiae purports to condemn.

Today we have been called upon to decide whether section 21.06 of the Texas Penal Code lacks a rational basis or otherwise violates the constitutional right to privacy found in the constitutions of either Texas or the United States. We have done so—not because of political pressures, as amicus curiae has suggested, but despite them.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.
En banc.
Publish — TEX. R. APP. P. 47.3(b).

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[2] *See, e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 313 (1997) (observing that "[i]t is irresponsible for critics of the courts to argue that only results matter, without regard to the legal principles that govern judicial decision making").

Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The
Fourteenth Court of Appeals

NOS. 14-99-00109-CR & 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 & 98-48531

CONCURRING OPINION ON MOTION FOR REHEARING EN BANC

[41 S.W. 3d at 364]

Today the Court holds that section 21.06 of the Texas Penal Code is not unconstitutional. I join in the court's opinion, however I write separately to make the following comments.

First, once the decision is made that the classifications in section 21.06 are not gender based, the analysis is relatively straightforward. A gender-based classification would require a heightened scrutiny of section 21.06 because gender is a protected class. However, sexual preference has not been designated a protected class by the United States Supreme Court, the Texas Supreme Court, or the Texas Court of Criminal Appeals. *See* Majority Op. n.8 *supra*. Consequently, in deciding whether 21.06 is constitutionally sound, we look only for a rational relationship between section 21.06 and the State's reasons for enacting it.[1]

The State argues that 21.06 is directly related to the legislature's right to legislate morality. The United States Supreme Court has held that it is within a State's legitimate police power to legislate on grounds of morality. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Berman v. Parker*, 348 U.S. 26, 32 (1954). Thus, we need only determine if section 21.06 is related "to the pursuit " of implementing morality.

The United States Circuit Court for the Fifth Circuit has already held that 21.06 concerns issues of morality. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985). In reviewing section 21.06, that court held, "[i]n view of the strong objection to

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[1] The dissent argues that the rational relationship test we are to use here is a higher standard than the rational relationship test normally is; however, that distinction is not apparent in the case law, and the dissent does not point to any particular language that supports this argument.

homosexual **[41 S.W. 3d at 365]** conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that section 21.06 is 'totally unrelated to the pursuit of,' implementing morality, a permissible state goal." (internal citations omitted). That is the same justification upon which the majority relies to reach the conclusion that the Texas Legislature was exercising valid legislative powers in enacting section 21.06. I agree that the justification is legally sound. It is not our duty to assess the wisdom or desirability of the law, *see New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), nor does "[t]his court ... invalidate bad or foolish policies, only unconstitutional ones; we may not 'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Id.* As the majority states, "our power to review the moral justification for a legislative act is extremely limited."

Secondly, I concur with the majority in its rationale and holdings as to both the Equal Protection and Privacy sections of the opinion. I would only add that, as to whether section 21.06 unconstitutionally discriminates on the basis of gender, it clearly does not. This is not merely because of the equal application of the statute to men and women, but because this statute does not contain a discriminatory classification based on gender.

The dissent contends that, like the statute struck down in *Loving v. Virginia*, this statute "equally punishes," in this case, based on gender classification, which makes the statute gender based. 388 U.S. 1 (1967). That argument is creative, but misguided. In *Loving*, the Court struck down a statute because the statute furthered a loathsome discrimination — racism that implied a "superior" white person marrying an "inferior" black person does so at the risk of both being punished. The *Loving*

court correctly recognized that this was the kind of discriminatory law sought to be vanquished by the Fourteenth Amendment; one that advanced the fallacy of racial superiority. However, *Loving* is not on point in this case because section 21.06 does not advance the fallacy of gender superiority. It prohibits a same-sex sexual relationship. The fact that sexual orientation necessarily depends upon the sex of the parties does not mean that section 21.06 is the kind of statute that *discriminates* on the basis of gender. Gender is treated as an elevated class under the Fourteenth Amendment because this country saw a need to rid itself of outdated notions of a woman's inferiority to a man.[2] *Reed v. Reed*, 404 U.S. 71 (1971); *Phillips v. Marietta Corp.*, 400 U.S. 542 (1971); *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F.Supp. 593 (S.D.N.Y. 1970); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971). There is nothing in section 21.06 that furthers any unequal treatment between the sexes. The dissent's argument to the contrary is not a legally sustainable one.

Finally, I also take issue with the dissent's treatment of the majority's reliance on *Bowers v. Hardwick*. The dissent correctly points out that *Bowers v. Hardwick* deals with the Due Process Clause, while the majority's analysis depends upon the Equal Protection Clause of the Fourteenth Amendment. The dissent remarks that **[41 S.W. 3d at 366]** "[t]his blending of quite distinct elements of the Federal Constitution blunts the force of the majority's equal protection arguments." I disagree.

First, the dissent overlooks the fact that the ultimate analysis in both *Bowers* and this case turns on the application

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[2]As the majority stated, "neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a 'suspect class.'"

of the rational basis test. This test does not differ depending on whether it is applied in a "due process" or an "equal protection" context. The test remains the same: does the statute further some legitimate, articulated state purpose? *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 461-62 (1988) (analyzing a Fourteenth Amendment Equal Protection claim based on whether the statute at issue had a "rational relation to a legitimate government objective . . ."); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488, (1955) (analyzing a Fourteenth Amendment Due Process claim under the rational basis test by stating, ". . . to be constitutional, [i]t is enough that there is an [issue] at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *see Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (analyzing a Fifth Amendment Due Process claim using a rational basis test drawn from Equal Protection cases that stated the statute must be "rationally based and free from invidious discrimination . . ."). *Bowers* holds that states are within the scope of legislative authority – and further a legitimate state purpose – when their legislatures base laws on concepts of morality. Therefore, the application of *Bowers* does not "blunt[] the force of the majority's equal protection arguments."

Secondly, the dissent charges that the majority merges *Bowers'* due process analysis with the equal protection issue in this case. That statement is incorrect. The majority cites *Bowers* only three times: (1) in reference to legislating on notions of morality; (2) in reference to the privacy issue; and (3) for the contention that sodomy was an offense in all fifty states and in the District of Columbia prior to 1961. The majority's analysis of whether section 21.06 should be subject to some level of

heightened scrutiny in an equal protection analysis does not depend on the *Bowers* decision. The dissent's implication to the contrary is inaccurate.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.
En banc.
Publish — TEX. R. APP. P. 47.3(b).

Affirmed on Rehearing En Banc: Majority and Dissenting Opinions of June 8, 2000, Withdrawn, and Substitute Majority, Concurring and Dissenting Opinions filed March 15, 2001.

In The
Fourteenth Court of Appeals

NOS. 14-99-00109-CR &
14-99-00111-CR

JOHN GEDDES LAWRENCE AND TYRONE GARNER, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court At Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 and 98-448531

DISSENTING OPINION

[41 S.W. 3d at 366]

I respectfully dissent to the majority's Herculean effort to justify the discriminatory classification of section 21.06 of the Penal Code despite the clear prohibitions on such discrimination contained in the Equal Protection Clause of the United States Constitution and the Texas Equal Rights Amendment in the Bill of Rights of the Texas Constitution.

Appellants are before this court challenging the constitutionality of Texas Penal Code section 21.06. They bring four issues: (1) whether the statute violates the right to federal constitutional equal protection *as applied and on its face*; (2) whether the statute violates the right to state constitutional equal protection *as applied and on its face*; (3) whether the statute violates the appellants' right to privacy under the Texas Constitution; and (4) whether the statute violates the appellants' right to privacy under the United States Constitution.

I believe appellants' federal right to privacy challenge is controlled by the Supreme Court's determination in *Bowers v. Hardwick*. The Due Process Clause of the Federal Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. 478 U.S. 186 (1986). I would reach the same conclusion on appellants' **[41 S.W. 3d at 367]** privacy claim under the Texas Constitution. The Texas Supreme Court, borrowing heavily from *Bowers*, denied the existence of an asserted privacy right by insisting that adultery is "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *Henry v. City of Sherman*, 928 S.W.2d 464, 470 (Tex. 1996). "Because homosexual conduct is not a fundamental right under the United States Constitution, adultery, likewise, cannot be a fundamental right." *Id.* Accordingly, I concur in the result reached by the majority on appellants' third and fourth issues,

but for the reasons set forth below, strongly disagree with the majority's treatment of appellants' state and federal equal protection arguments.

I.
Application of Equal Protection to Section 21.06: An Overview

Appellants contend section 21.06 violates their rights of equal protection under the United States and Texas Constitutions. Under the Fourteenth Amendment, the statute must fail because even applying the most deferential standard, the rational basis standard, the statute cannot be justified on the majority's sole asserted basis of preserving public morality, where the same conduct, defined as "deviate sexual intercourse" is criminalized for same sex participants but not for heterosexuals. The contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislatures' unconstitutional edict. The statute must also fail because statutory classifications that are not gender neutral are analyzed under the heightened scrutiny standard of review, and there is no showing by the State either that there is an exceedingly persuasive justification for the classification, or that there is a direct, substantial relationship between the classification and the important government objectives it purports to serve.

Similarly, section 21.06 cannot withstand scrutiny under the Texas ERA, Article I, §3a of the Texas Constitution. The ERA is part of the Texas Bill of Rights. Under Article I, § 29 of the Bill of Rights, the Inviolability Clause, statutes that contravene anything in the Bill of Rights are *per se* void. Because section 21.06 discriminates on the basis of gender, thus

violating Article I, §3a, it is void. Moreover, applying the less rigorous standard of strict scrutiny, mandated by *McLean*, produces the same result. *In re McLean*, 725 S.W.2d 696 (Tex. 1987). Under strict scrutiny as applied in Texas, the proponent of gender discrimination must demonstrate a compelling interest and that there is no other manner to protect the state's compelling interest. *Id.* This requirement places the burden to support the statute squarely upon the State and not on the challenger, and the State, as discussed here and in this Court's original opinion, has failed to make the required showing to defeat a challenge under the Texas ERA.

II.
Section 21.06 and the Fourteenth Amendment: Equal Protection, Gender, and Heightened Scrutiny Review

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The general rule is that legislation is presumed valid and will be sustained if the **[41 S.W. 3d at 368]** classification drawn by the statute is rationally related to a legitimate state interest. *Id.* However, within the three-tiered federal equal protection scheme, legislative classifications based on gender call for a heightened standard of review, one step below the most rigorous strict scrutiny review applied to statutory classifications based on race, alienage, or national origin. *Id.* Under the heightened standard, a gender classification fails unless it is substantially

related to a sufficiently important governmental interest. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).[1]

A. *Section 21.06 Is Not Gender Neutral*

In its analysis of appellants' gender discrimination contention, the majority attempts to transfer the burden of proof to appellants to show the statute has had an adverse effect upon one gender, and that such disproportionate impact can be traced to a discriminatory purpose. This transfer is based on the naked assertion that section 21.06 is gender-neutral because it does not impose burdens on one gender not shared by the other. That 21.06 is not gender neutral is manifest based on application of the statute to the following events:

> There are three people in a room: Alice, Bob, and Cathy. Bob approaches Alice, and with her consent, engages with her in several varieties of "deviate sexual intercourse," the conduct at issue here. Bob then leaves the room. Cathy approaches Alice, and with her consent, engages with her in several kinds of "deviate

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[1] The best short analysis of the three tests for considering whether legislation violates the Equal Protection Clause of the Fourteenth Amendment is set out in *Clark v. Jeter*, 486 U.S. 456, 461 (1988):

> At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights are given the most exacting [or strict] scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

> sexual intercourse." Cathy is promptly arrested for violating section 21.06.

I have indulged in this tableau to demonstrate one important point: one person simply committed a sex act while another committed a crime. While the acts were exactly the same, the gender of the actors was different, and it was this difference alone that determined the criminal nature of the conduct. In other words, because he is a man, Bob committed no crime and may freely indulge his predilection for "deviate sexual intercourse," but because she is a woman, Cathy is a criminal. Thus, women are treated differently in this scenario, and therefore, are discriminated against by the explicit gender-based prohibition of section 21.06, and to suggest otherwise is disingenuous at best.[2] It is also no answer to insist that because the statute also subjects men to similar discrimination in different scenarios, somehow the discrimination here is rendered constitutionally acceptable. Discrimination in one instance is not cured by additional discrimination in another. Moreover, section 21.06 grew out of the revision of the penal code in 1973.[3] In the new statute, two **[41 S.W. 3d at 369]** standards were created, demarcated by the sex of the actors: deviate sexual intercourse when performed by a man and a woman would henceforth be legal, but deviate sexual intercourse performed by two men or two women would remain

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[2] The characteristic injury of gender discrimination lies not in the failure to be treated on a gender-blind basis, but rather in being deprived of opportunity because one is a woman, or because one is a man. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-29 (2d. ed. 1988).

[3] Convening in 1973, the 63 rd Legislature, passed the revised Penal Code, which was enacted in 1974. *See* Acts 1973, 63 rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

illegal. Thus, after 1974, the distinction between legal and illegal conduct was clearly not the act, but rather the sex of one of the participants.

B. *Equal Discrimination Argument Not A Cure*

While not precisely a model of clarity, the majority appears to accept the State's contention that because section 21.06 applies equally to men and women, the statute does not discriminate on the basis of gender. I draw this conclusion based on the majority's rejection of appellants' argument that *Loving v. Virginia*, 388 U.S. 1 (1967) discredited the "equal application" defense of 21.06, and conclusion that 21.06 does not impose burdens on one gender not shared by the other. However, the United States Supreme Court has rejected the majority's position in a variety of cases.

One example of the Court's rejection of the "equal discrimination" argument is found in *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden,* 465 U.S. 208, 217-18 (1984). In that case, the Supreme Court invalidated a municipal ordinance in Camden, New Jersey, requiring that at least forty percent of employees working on city construction projects be city residents. Camden's Mayor and City Council argued the ordinance did not violate the strictures of the Privileges and Immunities Clause of the Fourteenth Amendment, which requires that out-of-state residents be afforded the same job opportunities as in-state residents, because not only out-of-state residents were burdened by the ordinance. In fact, the respondents argued, many in-state residents, who did not live within the city of Camden, were as burdened by the ordinance as the out-of-state workers who brought the suit. Rejecting the "equal discrimination" argument, the Supreme Court stated "the

Camden ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." *Id.* (citing *Zobel v. Williams*, 457 U.S. 55, 75 (1982) (O'Connor, J., concurring)).

A second example of the Court's rejection of additional "curative" discrimination is noted in *Hunter v. Underwood*, 471 U.S. 222 (1985). In *Hunter*, the Court struck down a provision of the Alabama Constitution that mandated disenfranchisement for people who committed "crimes of moral turpitude." Although facially neutral, the Court determined the provision was enacted with the intent of discriminating against blacks and disparately impacted blacks as well because it had disenfranchised ten times as many blacks as whites. *Id.* at 227. Appellant, the State of Alabama, argued that although the constitutional provision was intended to discriminate against blacks, it did not violate the Equal Protection Clause because it was also intended to discriminate against poor whites. The Court held that the intention to additionally discriminate against whites "hardly saves [the Alabama provision] from invalidity." *Id.* at 231. An additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against blacks. *Id.* at 232. **[41 S.W. 3d at 370]** Thus, again, the Court declined to accept additional discrimination as a purported cure for a clearly discriminatory law.

Finally, the Supreme Court discussed the logic of an argument analogous to the State's argument here in *Loving v. Virginia*, 388 U.S. 1 (1967). There, the State of Virginia argued that Virginia's miscegenation statutes do not constitute invidious racial discrimination because the statutes apply equally to whites and blacks. *Id.* at 8. The miscegenation statutes, the State contended, equally penalized both whites who intermarried and blacks who intermarried; therefore, the "equal application" of the statutes rendered them acceptable under the

Fourteenth Amendment using a rational basis standard. *Id.* Rejecting this sophistry, the Court responded that the mere equal application of a statute containing racial classifications does not remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination. *Id.* By using the race of an individual as the sole determinant of the criminality of his conduct, the State created and perpetuated an invidious racial classification in violation of the Fourteenth Amendment. *Id.* at 11. Accordingly, the Court reaffirmed the propriety of strict scrutiny and struck down the Virginia statutes as unconstitutional. *Id.* at 12.

I would also reject the equal application argument offered here. Merely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, neither salvages nor cures the discriminatory classification contained in this statute. The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual, not the conduct, is the sole determinant of the criminality of the conduct.

Indeed, the State's and the majority's utilization of the equal application justification for 21.06 detrimentally impacts their unified position. If in *Loving* the equal application of the anti- miscegenation statutes to both blacks and whites did not negate the existence of a racial classification, then here, equal application of the anti-homosexual-sodomy statute to both men and women does not negate the existence of a sex classification. Alternatively, if 21.06 does not contain a sex-based classification because it applies equally to men and women, then the anti-miscegenation statutes in *Loving* did not contain a race-based classification, with the logical corollary that *Loving* was wrongly decided. Here, the State and the majority go to great lengths to manufacture a conclusion that 21.06 is

gender neutral. They must, because acknowledging the facial and as applied gender discrimination within 21.06 vitiates any defense of that statute inasmuch as the State has failed to establish either that the classification created by the statute is substantially related to important and legitimate government objectives, the test applied under heightened scrutiny, or identify a compelling state interest for purposes of strict scrutiny.

The issue regarding whether 21.06 is gender neutral lies at the core of this case. The majority, in a somewhat cursory fashion, dispenses with *Loving* and moves quickly to the conclusion of gender neutrality without addressing, among other things, the tableau set forth above in this part II. This conclusion of neutrality is essential for the majority to access the rational basis review, avoid heightened scrutiny mandated for gender discrimination, and most importantly, avoid any analysis of appellants' claims under the Texas **[41 S.W. 3d at 371]** ERA. However, limiting analysis of 21.06 to rational basis review is incomplete.

In an equal protection analysis of a legislative classification such as that drawn in 21.06, the appropriate framework for reviewing the scheme is to first ask whether the law survives rational basis analysis, and, if it does, the second inquiry is whether the distinction will pass heightened scrutiny. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). Both *Hooper* and *Zobel v. Williams*, 457 U.S. 55 (1982) analyzed statutory classifications violating the Equal Protection Clause by deferring heightened scrutiny analysis until a determination is made that it survived a rational basis analysis. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986). Thus, here, because the majority has determined that 21.06 survives rational basis scrutiny, and fails to then apply

heightened scrutiny review, its analysis under the Equal Protection Clause is incomplete. *Romer v. Evans*, 517 U.S. 620 (1996) is consistent with this approach. There, because Amendment 2 was in violation of the Equal Protection Clause applying rational basis review, there was no need to examine the statute under heightened scrutiny. Thus, the majority's conclusion that 21.01 is gender neutral will not allow omission of heightened scrutiny review.

C. *Standard of Review For Gender Discrimination*

Inasmuch as section 21.06 is not gender-neutral, the next inquiry is determining the appropriate burden of proof and assigning that burden. In 1982, in *Mississippi University for Women*, the Court held that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. 458 U.S. at 724. The burden is met only by showing, at a minimum, that the classification serves important governmental objectives. *Id.* There is, however, a further inquiry if the State's objective is legitimate and important. The reviewing court must then determine whether the requisite direct, substantial relationship between the objective sought and means used is present. *Id.* This is heightened scrutiny.

The Supreme Court again addressed the issue of whether the Equal Protection Clause forbids gender based discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Specifically, the Court examined the use of peremptory challenges on the basis of gender under the dictates of the Equal Protection Clause and the court's holding in *Batson v. Kentucky*, which prohibits peremptory strikes solely on the

basis of race. 476 U.S. 79 (1986). The court held the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender. *J.E.*B., 511 U.S. at 146. In reaching that conclusion, the *J.E.B* Court acknowledged that "our Nation has had a long and unfortunate history of sex discrimination," a history which warrants the heightened scrutiny afforded all gender-based classifications. *Id.*

In *United States v Virginia*, 518 U.S. 515, 533 (1996), the Supreme Court reiterated the burden of proof for cases of official classification based on gender as requiring the reviewing court to determine whether the proffered justification is exceedingly persuasive, and declared "[t]he burden of justification is demanding and it rests entirely on the State." Further, the Court held that the justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. *Id.* And, it must not **[41 S.W. 3d at 372]** rely on overbroad generalizations about different talents, capacities, or preferences of males and females. *Id.* This is the heightened review standard applied to classifications based on sex. *Id.*

D. *Failure to Satisfy the Heightened Scrutiny Standard*

In its original brief filed with this court, the State contends that section 21.06 must be upheld if there is any rational relationship between the disparity of treatment reflected in that statute and a legitimate state interest. The State seeks to apply the general rule that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440. To satisfy the rational relationship burden, the State asserts the statute is rationally related to permissible governmental purposes, the discouragement of

behavior historically perceived to be immoral, and the promotion of family values. This assertion was reiterated in the State's brief in support of its motion for rehearing en banc. The majority also adopts this rational relationship standard.[4] The

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[4] The majority's entire analysis of appellants' equal protection issues is premised on the belief that 21.06 is gender neutral on its face. The comparison of 21.06 and the definition of "deviate sexual intercourse" in 21.01 set out in note 9 below, I believe, adequately dismantles facial neutrality contentions. This misinterpretation of 21.06 has led the majority into error. Moreover, for unexplained reasons, the majority has merged a due process analysis with an equal protection analysis by stating there is no fundamental right to engage in sodomy. Whatever the merits of that contention, it is sourced from the Court's analysis of the Due Process Clause in *Bowers v. Hardwick* where the Court was unwilling to extend the Due Process Clause to confer "a fundamental right to engage in acts of consensual sodomy." 478 U.S. 186, 192 (1986). This blending of quite distinct elements of the Federal Constitution blunts the force of the majority's equal protection arguments. Indeed, that the majority is in fact attempting to analyze 21.06 under the Due Process Clause is manifest from (a) its failure to address how a ban of homosexual sodomy preserves public morals while permitting heterosexual sodomy, but (b) justifying the statute based on historical analysis and the common law, and references to seventeenth century laws banning homosexual conduct in the Massachusetts Bay Colony. *See* discussion of Cass Sunstein's analysis of the distinctions between the Due Process and Equal Protection Clauses at note 12 below.

Nevertheless, even assuming the statute is gender neutral on its face, it is not gender neutral as applied, an argument also advanced by appellants. I have, in part II A above, demonstrated the application of section 21.06 is not gender neutral when applied to appellants. The majority recognizes that a facially neutral statute may support an equal protection claim where it is motivated by discriminatory intent and its application results in a discriminatory effect, citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Despite this acknowledgment of the rule, the majority prefers here, as elsewhere in the opinion, to impose a burden of proof not required in an inquiry based on gender discrimination. The Supreme Court has consistently subjected gender-based classifications to heightened scrutiny in recognition of the real

State's and the majority's arguments that 21.06 survives a challenge under federal equal protection are untenable.[5]

First, the State and the majority have applied the wrong standard. As set out in *City of Cleburne*, the three standards of equal protection review, from highest to **[41 S.W. 3d at 373]** lowest, are strict scrutiny, heightened review, and rational relationship. 473 U.S. 440-441. Under *Heitman v. State*, the court held that decisions of the Supreme Court represent the minimum protections that a state must afford its citizens. 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). The federal constitution sets the floor for individual rights, and state constitutions cannot subtract from the rights guaranteed by the United States Constitution; however, they can provide additional rights to their citizens. *Id.* It appears, therefore, that the State and the majority have attempted to apply a lower threshold standard of review to gender-based discrimination than the heightened standard mandated by the United States Supreme Court. It is not within the discretion of an intermediate court to ignore United States Supreme Court

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danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations. *J.E.B.*, 511 U.S. 127, 135 (1994).

[5] The majority's statement that the State can, in many instances, pass laws the purpose of which is to preserve morals is correct. However, that license is subject to the Equal Protection Clause, and if the statute is not rationally related to the asserted State interest, or classifies on the basis of gender without a compelling state interest, the license is revoked.

precedent regarding the appropriate standard of review for gender based classifications challenged, as appellants have done here, under the Equal Protection Clause of the Fourteenth Amendment. The court in *Heitman* stated the rule more succinctly: this court is not at liberty to reduce the protections afforded its citizens to a level less than that established under the federal constitution. 815 S.W.2d at 690. *A fortiori*, by applying the improper standard of review, the majority has accomplished the following: it has afforded appellants a level of protection less than that prescribed by courts whose opinions we are required to follow.

Second, the majority apparently has accepted the State's obfuscation of the issue of gender discrimination in 21.06, thus lowering the State's burden of proof. It is well established that a gender classification fails unless the party seeking to uphold the statute satisfies the dual burden of showing a persuasive justification or objective for the classification and that the discriminatory means employed are substantially related to the objective. *Mississippi Univ. for Women*, 457 U.S. at 724-725. Where, as here, there is not even a whisper or hint in the majority opinion purporting to demonstrate how the State satisfied the *minimum* rational relationship showing required to sustain 21.06 in the face of an equal protection challenge, it is difficult to understand how the majority can conclude 21.06 does not violate appellants' federal equal protection rights.[6]

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[6] As noted above, the majority's equal protection analysis is incomplete because it fails to engage in intermediate scrutiny required for review of a challenged classification under the Equal Protection Clause where, as here, the majority has concluded 21.06 satisfies rational basis

E. *Proper Application of Heightened Scrutiny Review*

Turning now to the case *sub judice*, a rather succinct two part test exists for evaluating the validity of the gender-based classification in 21.06 against a federal equal protection challenge, and it is couched in terms of dual burdens on the proponent of the statute: (1) has the proponent demonstrated a legitimate and exceedingly persuasive justification for the gender based classification contained in 21.06; and (2) has the proponent demonstrated the requisite direct, substantial relationship between the classification and the important government objectives it purports to serve. *Heckler v. Mathews*, 465 U.S. 728, 745 (1984).

(1). The justification asserted here for 21.06 is promotion of family values and discouragement of immoral behavior. At the outset, it should be noted that "promotion of family values" has not been defined by the State, but it is not illogical to assume that it has some relationship to the **[41 S.W. 3d at 374]** institution of marriage and procreation. Thus, the State's contention must be that permitting deviate sexual intercourse between heterosexual couples promotes family values while such conduct by same sex couples promotes something less than that. What is interesting to note is the fact that deviate sexual intercourse, as defined in section 21.01 of the Penal Code, regardless of the gender of one's sex partner, will not permit a female's ovum to be fertilized, thus creating a pregnancy. It must, therefore, be concluded that the State's acquiescence in heterosexual deviate sexual intercourse permits heterosexuals, whether married or not, to engage in a variety of historically repugnant "recreational sex" acts. To contend, as

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review. *Hooper*, 472 U.S. at 618.

the State must, that a man somehow promotes family values by engaging in deviate sexual intercourse with a woman, but undermines those values by performing the same deviate sex act with a man, does not, in my view, constitute a showing of an exceedingly persuasive justification for the gender based classification in 21.06.[7]

Nor does the asserted justification of discouraging immoral behavior constitute such a showing. The behavior to be *discouraged* is deviate sexual intercourse between same sex co: les. That same behavior between heterosexual couples is, by implication, moral and something to be *encouraged*. Sodomy is either immoral or it is not. It appears that the State's vigorous defense of 21.06 has been advanced without due consideration of the inconsistency of, on the one hand, condemning sodomy as immoral, but on the other implicitly embracing sodomy as perfectly moral. Again, such incongruity is not exceedingly persuasive.

(2). Because the test articulated in *Heckler* is described in the conjunctive, it follow s that if the State has failed to articulate a legitimate and exceedingly persuasive justification, we need not reach the second part of the test. Nevertheless, even if family values and prevention of immoral behavior were legitimate and persuasive justifications for the gender classification, the discussion above demonstrates there is no connection between penalizing homosexual sodomy and the achievement of those objectives. Neither heterosexual sodomy

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7 Because the Court in *Romer v. Evans*, 517 U.S. 620 (1996), implicitly rejected the justification of promoting family values in a rational basis analysis of a statute that discriminated against homosexuals based on sexual orientation, it follows that those same justifications, advanced here, could not satisfy heightened scrutiny. *See* part III below.

nor homosexual sodomy can create a new life. Further, encouraging heterosexual sodomy and punishing homosexual sodomy, as a Class C misdemeanor with a fine only, scuttles the State's asserted purpose of preventing immoral behavior inasmuch as 21.06 permits deviate sexual intercourse by any man with any woman. Thus, the State has failed to make a showing of how the gender- based classification is substantially and directly related to the proffered objective of discouraging immoral behavior. Perhaps this failure rests, in part, on the apparent impossibility of logically explaining how the classification in 21.06 is even remotely related to that objective where such behavior is simultaneously sanctioned and is presumably engaged in routinely. Where, as here, the proponent of a gender-based statutory classification fails to establish the requisite relationship between the objective and the means used to achieve it, the statute is invalid . *See Mississippi Univ. for Women*, 458 U.S. at 730.

The mere recitation of a benign purpose is not an automatic shield that protects **[41 S.W. 3d at 375]** against any inquiry into the actual purposes underlying a statutory scheme. *Id.* at 728. Having performed the analysis dictated by intermediate scrutiny, it must be concluded the State failed both to articulate a persuasive justification and to demonstrate a direct relationship between the tendered objectives and the means utilized to achieve those objectives in 21.06. In the absence of legitimate objectives, the inevitable inference is raised that the disadvantage to homosexuals contained in 21.06 is born of animosity toward the persons affected. *See Romer*, 517 U.S. at 634. The Legislature's removal of the prohibition on heterosexual sodomy while retaining it for homosexual

sodomy cannot, in my view, be explained by anything but animus toward the persons it affects.[8]

Indeed, the State's purported justification for the classification in 21.06 in terms of upholding public morality founders on the distinction between public and private morality. The private morality of an individual is not synonymous with nor necessarily has an effect on what is known as public morality. The majority believes 21.06 preserves public morals. That conclusion is apparently reached *sua sponte* without the slightest showing by the State that such consequence flows from enforcement of 21.06. As set forth above, the State's general contention is that the statute discourages immoral behavior, without regard to the public or private nature thereof. Nevertheless, addressing the majority's contention, we are not told how government interference with the practice of adult only, consensual personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of "public morality" or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State. Here again, when one applies the clear test, articulated in *Heckler* and elsewhere, that a gender-based classification must fail an equal protection challenge absent a showing that the classification is substantially and directly related to the preservation of public

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[8] My conclusion that 21.06 was born out of animus towards the persons affected thereunder is buttressed by the statute's evolution. Until 1974, the penal code prohibited oral and anal copulation "with another human being." Thus, the statute prohibited all acts of sodomy, whether performed by members of the opposite or the same sex. *Pruett v. State*, 463 S.W.2d 191, 193 (Tex Crim. App. 1970). In 1974, a new penal code was enacted wherein sodomy performed by members of the same sex continued to be proscribed, but the same act performed by members of the opposite sex became, for the first time in 114 years, legal.

morality, the conclusion is obvious. Perhaps this is the reason the majority labors so hard to conclude 21.06 is gender neutral.[9]

III.
Equal Protection, Improper Classifications and Rational Basis Review

A. Romer v. Evans

I firmly believe 21.06 establishes a gender-based classification, on its face and as **[41 S.W. 3d at 376]** applied, in the Penal Code of the State of Texas that will not withstand middle tier scrutiny mandated for the analysis of such classifications under the Equal Protection Clause of the Fourteenth Amendment. Appellants, however, also challenge the statute because it unconstitutionally discriminates against homosexuals, thus imposing an unequal burden on them based on their sexual orientation because heterosexuals are not targeted by 21.06 when engaging in the same conduct. Here, the rational basis test, much preferred by the State, *is* applicable, but the result of a correct analysis applying federal precedent is contrary to the outcome sought by the State.

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[9] That 21.06 is not gender neutral on its face is demonstrated by the language in the statute. "A person commits an offense if he engages in deviate sexual intercourse *with another individual of the same sex*." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994) (emphasis added). The statute clearly specifies what the gender of the actors must be to constitute a criminal offense. Curiously, the definition of "deviate sexual intercourse" contained in section 21.01 is gender neutral. Such conduct is defined as "any contact between any part of the genitals of *one person* and the mouth or anus of *another person*; or ...the penetration of the genitals or the anus of *another person* with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994) (emphasis added).

The case that controls the disposition of appellants' contention that section 21.06 discriminates against a class based on sexual orientation is *Romer v. Evans*, 517 U.S. 620 (1996).[10] In *Romer*, the United States Supreme Court held that a Colorado constitutional amendment (Amendment 2) prohibiting official protection from discrimination on the basis of sexual orientation violated the Fourteenth Amendment's Equal Protection Clause. Using a rational basis standard of review, the most deferential test, the Court invalidated Amendment 2 which (1) contained a classification of "homosexuals," and (2) withdrew from homosexuals, but no others, legal protection from discrimination and prohibited reinstatement of these laws and policies. *See id.* at 627.

The primary rationale advanced by the State for Amendment 2, adverted to in the opinion, was respect for other citizens' freedom of association, and, in particular, the liberties of landlords or employers who have personal or religious objections to homosexuality. *Id.* at 635. In striking down Amendment 2, the Court stated, that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at 633. The inequality the Court detected was that homosexuals were singled out by Amendment 2 and accorded less protection of the law solely by virtue of their membership in the class. *Id.* at 635. Although the Court utilized a rational basis standard for its analysis, Amendment 2 still failed this most deferential standard because the Court found the amendment advanced no legitimate government interest. *Id.*

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10 Section B of this part III examines the application of the rational basis review to a city ordinance where the justifications for the classification it contained did not justify singling out one group for different treatment, thus rendering the classification irrational and unconstitutional as applied.

Thus, the *Romer* Court concluded Amendment 2 classified homosexuals not to further a proper legislative end, but to make them unequal to everyone else. *Id.*

Interestingly, Petitioner, the State of Colorado, offered other justifications for Amendment 2 similar to those offered by the State here.[11] In *Romer*, the State argued the "legitimate governmental interests" of Amendment 2 were the promotion of traditional moral norms and family values. *See* Petitioner's Brief at 45-47, *Romer* (1995 WL 310026). Specifically, the State posited the amendment fostered "family privacy and the ability to convey values to their children," by disallowing the "implicit endorsement of homosexuality **[41 S.W. 3d at 354]** fostered by laws granting special protections [that] could undermine the efforts of some parents to teach traditional moral values," and deterred factionalism within the state by "maximiz[ing] individual liberty, including the preservation of traditional norms." *Id.*

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11 In note 15, the majority refused to accept the fact that the State of Colorado *did* in fact make those arguments in its brief. Even though the arguments are not set out in the opinion, a reader may access them by going through the WestLaw reference in the *Romer* opinion, which brings up the briefs containing the rejected arguments. 517 U.S. at 621.

Far from accepting these justifications as legitimate, the Court apparently did not find they even merited review in the opinion. Thus, the Court, *sub silentio*, rejected the "implementation of traditional notions of morality" justification deemed sufficient in *Bowers v. Hardwick*, 478 U.S. at 196, and *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), both of which are relied upon by the State here.[12] In *Romer*, the

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[12] Justice Scalia's dissent in *Romer* concedes as much. He notes, that in "plac[ing] the prestige of [the Supreme Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias," the Court has essentially *sub silentio* overruled *Bowers*. 517 U.S. at 636-37. I agree with this characterization of *Romer*, and further note the rational basis analysis employed by the *Romer* Court may be more exacting than that employed by the Court in *Bowers*. The concurring opinion by Justice Fowler fails to appreciate the difference in the rational basis test as applied in a *Bowers* due process analysis versus a *Romer* equal protection analysis.

Although both *Bowers* and *Romer* applied the rational basis analysis to the state action in question, there is, nevertheless, a difference in the analysis of rational basis review under the Due Process Clause and under the Equal Protection Clause. These two clauses perform quite different functions. In its substantive dimension, the Due Process Clause protects a range of basic rights; it does not speak to the constitutionality of classifications. The Equal Protection Clause operates as a functional complement to the Due Process Clause, addressing a different set of questions. The Due Process Clause has frequently been understood as an effort to restrict short-term or shortsighted deviations from widely held social norms; it has an important backward looking dimension. For purposes of due process, the baseline for inquiry has tended to be the common law, Anglo American practice, or the status quo. The Due Process Clause is, therefore, closely associated with the view that the role of the Supreme Court is to limit dramatic and insufficiently reasoned change, to protect tradition and to bring a more balanced and disinterested perspective to legislation. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1171 (1988). Thus, in *Bowers*, the Court declined to find, as respondent requested, a fundamental right to engage in

Supreme Court focused, instead, upon the animus apparent from a provision that drew a classification "for the purpose of disadvantaging the group burdened by the law." 517 U.S. at 633. Because Amendment 2 drew such a classification, and then proceeded to disadvantage homosexuals because **[41 S.W. 3d at 378]** of their membership in the class, the amendment violated the equal protection of the law guaranteed by the Fourteenth Amendment.

The statute at issue here, much like Amendment 2, draws a classification for the purpose of disadvantaging the group burdened by the law. In fact, Justice Scalia, in his dissent to *Romer* readily agreed that, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.* at 641. I agree with Justice

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homosexual sodomy because sodomy was not a fundamental liberty that was deeply rooted in this Nation's history and tradition. *Bowers*, 478 U.S. at 192.

The Equal Protection Clause, on the other hand, has served an entirely different set of purposes from the Due Process Clause. That clause is emphatically not an effort to protect traditionally held values against novel or short-term deviations. The clause is not backward looking at all; it was consciously designed to eliminate practices that existed at the time of ratification and that were expected to endure. The function of the Equal Protection Clause is to protect disadvantaged groups against the effects of past and present discrimination by political majorities. It is not rooted in common law or status quo baselines or in Anglo-American conventions. The baseline is instead a principle of equality that operates as a criticism of existing practice. The clause does not safeguard traditions; it protects against traditions, however long standing and deeply rooted. Sunstein, *supra* at 1174. Thus, Justice Fowler's conclusion, that rational basis review under the Due Process Clause is the same as rational basis review under the Equal Protection Clause ignores the important distinction between the functions of the two clauses and how that distinction shapes review under each clause using the rational basis standard.

Scalia that the statute at issue here, by proscribing "deviate sexual intercourse" only when engaged in with members of one's own sex, does discriminate against homosexuals. However, following *Romer*, I view the justifications proffered by the State, enforcement of traditional norms of morality and family values, as nothing more than politically-charged, thinly-veiled, animus-driven clichés.[13] Section 21.06 is, like Amendment 2, a status-based enactment divorced from any factual context from which one can discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. *Id.* at 635. Although a state's police powers are broad and comprehensive, the constitution, both state and federal, "forbids its exercise when the result would be the destruction of the rights, guarantees, privileges, and

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13 I am not unmindful of the sensibilities of many persons who are deeply persuaded that homosexual sodomy is evil and should be prohibited. That is not the issue here. Rather, the federal equal protection issue before this court, which I believe should be answered in the negative, is whether the Federal Constitution permits discriminatory recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members remain entirely free to employ theological teaching, moral persuasion, parental advice, psychological and psychiatric counseling, and other noncoercive means to condemn the practice of homosexual sodomy. *People v. Onofre*, 415 N.E.2d 936, 941 n.3 (N.Y. 1980). Alternatively, if the legislature wishes to abolish what it views as immoral behavior, it is free to do so, provided that it does not single out a class of people for the prohibition, while freely permitting other classes to engage in the same behavior, thereby, again, running afoul of the federal Equal Protection Clause. But the law regarding the use of the criminal law to implement biases is clear: "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *City of Cleburne*, 473 U.S. at 448 (using rational relationship test to invalidate zoning ordinance requiring a special use permit for home for the mentally retarded where no special permit required for other similar multiple dwelling facilities).

restraints excepted from the powers of government by the Bill of Rights." *Fazekas v. University of Houston*, 565 S.W.2d 299, 305 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (citing *Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007 (1934)). Thus, stripped of its asserted justifications, the classification drawn in 21.06 is arbitrary and irrational, and fails the rational basis test.

Regarding appellants' issue on sexual orientation discrimination aspect of 21.06, the majority, *inter alia*, concludes there is no fundamental right to engage in sodomy, and homosexuals do not constitute a suspect class. These two conclusions are irrelevant here because appellants do not raise these arguments, and the first conclusion implicates *Bowers v. Hardwick* where equal protection was not argued or addressed.

B.

City of Cleburne

Legislation containing a classification challenged under the Equal Protection **[41 S.W. 3d at 379]** Clause must, in order to withstand rational basis review, be rationally related to a legitimate governmental purpose. *City of Cleburne*, 473 U.S. at 446. The State may not rely, however, on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Zobel*, 457 U.S. at 61-63. Objectives such as a bare desire to harm a politically unpopular group are not legitimate State interests. *City of Cleburne*, 473 U.S. at 447.

In *City of Cleburne*, the Court struck down a city zoning ordinance requiring a special use permit for a home for the mentally retarded, but exempting from such a permit apartment houses, fraternity houses, apartment hotels, hospitals, private

clubs and other specified uses. *Id.* Plainly stated, the equal protection issue there presented was: "May the city require the permit for this facility when other care and multiple dwelling facilities are freely permitted?" *Id.* at 448. The Federal District Court had found, and the Court of Appeals and Supreme Court repeated the obvious fact that if the potential residents of the home for the mentally retarded were not in fact so afflicted, and the home was the same in all other respects, its use would be authorized under the zoning ordinance. *Id.* at 449.

The city presented several bases supporting the ordinance: fear and negative attitudes by residents living near the facility; location of the home in a five hundred year flood plain; the size of the home and the number of people who would occupy it. The *City of Cleburne* Court demonstrated how each factor presented by the city made no sense in light of how the city treated other groups similarly situated in relevant respects. *Id.* at 448-450. Because none of the asserted bases rationally justified singling out a home for the retarded for the special use permit, while imposing no such restrictions on other uses freely permitted in the neighborhood, the Supreme Court concluded:

> [R]equiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the [home] and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

Id. at 450.

Applying the *City of Cleburne* rational basis review here, because the State's grounds purporting to justify 21.06 do

not rationally justify criminalizing same sex sodomy while imposing no such burden on others engaging in acts defined as deviate sexual intercourse, the classification is arbitrary and irrational and driven by prejudice. It makes no sense for the State to contend that morals are preserved by criminalizing homosexual sodomy while supporting sodomy by heterosexual couples, including unmarried persons. The State simply may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Zobel*, 457 U.S. at 61-63. Where, as here, the State interest of preserving morality is irrational in light of authorization of the same immoral acts by others, the statute fails rational basis review under the Equal Protection Clause and should be held in violation of the United States Constitution. *Heller v. Doe by Doe*, 509 U.S. 312, 324 (1993) (stating a statutory classification fails rational basis review when it rests on grounds wholly irrelevant to achievement of the state's objective).

[41 S.W. 3d at 380]

The majority's discussion of the historical definitions of sodomy, which includes a reference to a seventeenth century law of the Massachusetts Bay Colony, suggests that homosexuals have been subjected to a tradition of disfavor. In his concurring opinion in *City of Cleburne*, Justice Stevens, joined by Chief Justice Burger, distanced himself from the tiered analysis of equal protection claims because, he believed, the rational basis test is suitable for all such inquiries. 473 U.S. at 452. In every equal protection case, he wrote, we have to ask certain basic questions: What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? *Id.* at 453. In a footnote to this question, Justice Stevens stated the following:

> The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is made. *Id.* at n.6.

Because the State has not shown a valid state interest for 21.06 that is rationally served by proscribing sodomy only when performed by homosexuals, the unavoidable conclusion is that the statute was merely a continuation of the stereotyped reaction to a traditionally disfavored group. By its unquestioning acceptance of the State's justification for the statute, the majority has overlooked the illegitimate stereotyping lying at the core of 21.06.

C.

Judge Norris, concurring in *Watkins v. U.S. Army*, 875 F.2d 699, 720 (9th Cir. 1989), captured, in my view, the core rationale underlying the Equal Protection Clause of the Fourteenth Amendment. He wrote that the equal protection doctrine does not prevent the majority from enacting laws based

on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. *Id.* Indeed, the equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process. The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression. *Id.*

Therefore, I would hold section 21.06 violates the Equal Protection Clause based on appellants' contentions that it discriminates based on both gender and sexual orientation. Accordingly, I would sustain appellants' first point of error challenging 21.06 on federal equal protection grounds, as applied and on its face.

IV.

Section 21.06 and The Texas Equal Rights Amendment

Appellants also challenge 21.06 contending it violates Article I, §3a of the Texas Constitution in that it proscribes otherwise lawful behavior solely on the basis of the sex of the participants. That provision of the Texas Bill of Rights provides as follows:

> Equality under the law shall not be denied or abridged because of sex, race, **[41 S.W. 3d at 381]** color, creed, or national origin. This amendment is self-operative.

In my opinion, there are two standards by which review of section 21.06 may be made 24 in the face of a challenge

under the Texas ERA. The first is a *per se* rule based on the mandate of Article I, §29 of the Texas Bill of Rights, and the second is strict scrutiny under the guidance of *In re McLean*, 725 S.W.2d 696 (Tex. 1987).

A. *Per Se Rule*

Article I, §29 of the Texas Bill of Rights states the following rule regarding the power of the state government to usurp any of the rights contained in Article I of the Texas Constitution:

> To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Section 29 has been interpreted as follows: any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-149 (Tex. 1995). When a law conflicts with rights guaranteed by Article I, the constitution declares that such acts are void because the Bill of Rights is a limit on State power. *Id.* at 149. Indeed, the Bill of Rights consists of express limitations of power on the legislature, executive officers, and the judiciary. *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 90 (Tex. 1997) (citing *Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007 (Tex. 1934)). The framers of the Texas Constitution articulated what they intended to be the means of remedying a constitutional

violation: a law contrary to a constitutional provision is void. *Bouillion*, 896 S.W.2d at 149.

Thus, while the State, in the exercise of its police powers, may enact legislation reasonably tending to promote the health, comfort or welfare of the public, the extent of this power is limited and must be exercised in conformance with the limitations prescribed by the constitution. *Faulk v. Buena Vista Burial Park Ass'n*, 152 S.W.2d 891-95 (Tex. Civ. App.—El Paso 1941, no writ); *see also Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996) (McCormick, P.J., concurring) (characterizing dissent's approach to "privacy expectation" analysis as coming "perilously close to subjecting our constitutional rights too closely to majoritarian political processes and temporary passions of the moment, which is inconsistent with the idea underlying the Bill of Rights.").

Therefore, when the equality guaranteed by the Texas ERA is viewed through the prism of the Texas "Inviolability Clause,"[14] it becomes clear that section 21.06, as a non-gender neutral classification created by the legislature in violation of Article I, §3a, is void.[15]

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[14] Article I, §29 excepts everything in the bill of rights out of the general powers of government and states such rights included therein are to remain inviolate, thus placing these rights beyond the power of the state government to usurp. TEX. CONST. Art. I, § 29 interp. commentary (Vernon 1997).

[15] The majority never really addresses the Texas ERA, or the companion Inviolability Clause, in its analysis of appellants' challenge to 21.06 on the basis of gender discrimination under the Texas Constitution, even though Rule 47.1 requires that opinions from this Court "address[] every issue raised and necessary t final disposition of the appeal." TEX. R. APP. P. 47.1. Nevertheless, by its decision today the majority renders meaningless the action of the people of Texas in placing the ERA in the state

[41 S.W. 3d at 382]

B. *Strict Scrutiny Under In re McLean*

Before examining the precise manner in which the *McLean* court analyzed a statute that discriminated on the basis of sex, it is informative to review what that court had to say about the meaning of the Texas ERA.

The *McLean* court declined to give the Texas ERA an interpretation identical to that given state and federal due process and equal guarantees. 725 S.W.2d at 697. Both the United States Constitution and the Texas Constitution had due process and equal protection guarantees before the ERA was adopted in Texas in 1972. *Id.* If the due process and equal protection provisions and the ERA are given identical interpretations, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility. *Id.* Thus, the *McLean* court concluded the Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees. *Id.* at 698. The *McLean* court did not, however, adopt a *per se* standard,[16] but instead concluded the Texas ERA elevated sex to a suspect class, thus subjecting any gender discrimination to strict scrutiny, placing the burden on the proponent of the

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constitution, engaging in nothing less than the gratuitous nullification of an act of the people of Texas and totally disregarding their expressed constitutional will. *See Barber v. Colorado Indep.Sch.Dist.*, 901 S.W.2d 447, 455 (Tex. 1995) (Gammage, J., dissenting to majority's refusal to intervene and apply Texas ERA to a class action challenging high school's hair length and earring restrictions under the ERA based on gender discrimination).

16 There is no reference in *McLean* to Article I, §29.

discriminatory provision to demonstrate a compelling interest, *and* that there is no other manner to protect the state's compelling interest. *Id.* (citing *Mercer v. Board of Trust., North Forest Indep. Sch. Dist.*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (holding any classification based on sex is suspect classification; thus any law or regulation classifying persons for different treatment on basis of their sex is subject to strictest judicial scrutiny)). The Austin Court of Appeals has also concluded the Equal Rights Amendment elevates sex to a suspect class, thereby invoking strict scrutiny review when a law differentiates on the basis of gender. *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ).

Neither the State nor the majority have applied the strict scrutiny mandated by *McLean* and *Mercer*. Nevertheless, that standard must be applied. *McLean* established a two step process for examining a statute challenged as a violation of the ERA. The first step is to determine whether equality under the law has been denied. 725 S.W.2d at 697. That first inquiry is relatively simple. The denial of equality here was under the law because appellants were prosecuted under 21.06 of the Texas Penal Code. In *McLean,* the court held that because disparate treatment of an illegitimate child's father and mother was required by a statute in the Texas Family Code, the denial of equality was under the law. *Id.*

The second inquiry is whether equality was denied because of a person's membership in a protected class of sex, race, color, creed, or national origin. *Id.* As I have discussed above in connection with the analysis of appellants' federal equal protection challenge to 21.06, it is manifest on the face of that statute it is the gender of the particular actors that serves as the trigger for 21.06's prohibitions, so that discussion need not

be repeated here. Thus, addressing the second part of the *McLean* **[41 S.W. 3d at 383]** test, the focus is on whether the discrimination in 21.06 is prohibited by the ERA. *Id.* Sex-based discrimination is allowed to co-exist with the ERA only when the proponent of the discrimination can prove there is no other manner to protect the state's compelling interest. *Id.* Surprisingly, counsel for the State conceded at oral argument that he could not "even see how he could begin to frame an argument that there was a compelling State interest," much less demonstrate that interest for this Court. The State did offer, however, what it characterized as *legitimate* purposes for the statute: enforcement of principles of morality and promotion of family values.

It is simply not enough for the State to say it has an important interest furthered by the discriminatory law. *Id.* at 698. Even the loftiest goal does not justify sex-based discrimination in light of the clear constitutional prohibition contained in the Texas ERA. *Id.* Strict scrutiny is not satisfied until the State has met a two part test: articulation of a compelling state interest, and a showing that there is no other manner tc protect the state's compelling interest. *Id.* Thus, even accepting the morality and family values bases supporting the discrimination as compelling state interests, there is no showing here that there is no other manner of protecting morality and family values other than prosecuting same sex sodomy. It would appear that the state's goal of protecting these interests was originally achieved on a non-discriminatory basis when the prohibition of sodomy applied to all persons. *See* n.8, *supra*. There are other avenues for achieving the State's objectives without resorting to 21.06 as pointed out by the court in *Onofre*. *See* n.13, *supra*. It is manifestly illogical to suggest that sodomy, when performed by heterosexuals promotes morality

and family values, and that the same acts when performed by same sex couples, denigrates morality and family values.

As noted above, implicitly rejecting "morality" and "family values" as justifications for Colorado's discriminatory constitutional amendment, the United States Supreme Court struck down the amendment under a rational basis standard. *See* n.12, *supra*. Logic dictates that if the promotion of morality norms and family values as rationalizations for state sponsored discrimination will not pass a rational basis standard of review, such contentions would wilt in the face of strict scrutiny mandated by *McLean*. I conclude, therefore, that because the State has not shown there are no alternate means to protect the State's asserted interests of family values and morality other than through the gender-based discrimination in 21.06, the statute violates Article I, §3a of the Texas Constitution and is, therefore, void. *See* TEX. CONST. Art. I, § 29.

Accordingly, I would sustain appellant's point of error two challenging 21.06 under the Texas ERA.

V.
Conclusion

Analyzed correctly under binding Supreme Court precedent, Texas Penal Code section 21.06 is in violation of the Equal Protection Clause of the Federal Constitution because it is neither rationally related to the legitimate State objective presented for its support, nor viable under heightened scrutiny because the State failed to articulate a compelling interest served by the gender discrimination exhibited by 21.06 on its face and as applied. Further, under the Texas Bill of Rights, because the gender discrimination in 21.06 contravenes the

Equal Rights Amendment, it is automatically void without regard to any justification.

[41 S.W. 3d at 384]

The holding here that 21.06 is unconstitutional is not tantamount to a conclusion that there is nothing wrong with the prohibited conduct. The majority correctly states that mere disagreement with the Legislature over whether the conduct proscribed by 21.06 is or is not a bad deed is not a basis for overturning a statute. This statement, however, is incomplete because it ignores the duty a judge has when confronted by a statute in conflict with the constitution.

> The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it. In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will [expressed in the constitution]. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law.

Ex parte Rodriguez, 39 Tex. 705, 751 (1873).

The Texas Constitution does not protect morality; it does, however, guarantee equality to all persons under the law. TEX. CONST. art. I, § 3a. My personal views on the conduct involved here are irrelevant to the outcome that I believe is required. The foregoing is my duty in the preparation of opinions because Cannon 3B(5) of the Texas Code of Judicial Conduct requires a judge to "perform judicial duties without bias or prejudice." Thus, the result reached in this dissent is purely a function of the application of the Texas and Federal Constitutions to section 21.06, and nothing more. Accordingly, I respectfully dissent.

/s/ John S. Anderson
Justice

Dissenting Opinion filed March 15, 2001.
En Banc.
Publish—TEX. R. APP. P. 47.3(b).

Appendix D

Reversed and Rendered and Majority and Dissenting Opinions filed June 8, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00109-CR
NO. 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause No. 98-48530 and 98-48531

MAJORITY OPINION

Appellants, John Geddes Lawrence (Lawrence) and Tyron Garner (Garner), were charged with violating section 21.06 of the Texas Penal Code. Appellants pleaded *nolo contendere* and were fined $200 each. Lawrence and Garner bring this appeal, arguing their convictions should be reversed on both federal and state constitutional grounds. We reverse the judgments of the trial court, dismiss the complaints, and render judgments of acquittal.

I.
Factual and Procedural Background

Responding to a report of an armed intruder, police officers entered Lawrence's home, and found Lawrence and Garner engaged in sodomy. Because both participants were of the same sex, the officers arrested the two men for violating section 21.06 of the Texas Penal Code. Initially, Lawrence and Garner were charged by complaints in Harris County Justice Court and were convicted of engaging in homosexual conduct, and each was fined $125. They immediately appealed their case to the Harris County Criminal Court at Law, Number 10, a court of record, where the court denied their motions to quash their complaints on due process and equal protection grounds. After accepting their plea of *nolo contendere*, the trial court fined them $200 each.

On appeal, Lawrence and Garner challenge the constitutionality of section 21.06 in four issues: (1) whether the statute violates the right to federal constitutional equal protection as applied and on its face; (2) whether the statute violates the right to state constitutional equal protection as applied and on its face; (3) whether the statute violates the

appellants' right to privacy under the Texas Constitution, and (4) whether the statute violates the appellants' right to privacy under the United States Constitution.

II.
Scope of Review

We have considered all of appellants' points of error challenging section 21.06 and have concluded that their argument under the Texas Equal Rights Amendment is dispositive of this appeal. Therefore, we will not address appellants' federal right to privacy arguments. *See* TEX. R. APP. P. 47.1 (opinion must be as brief as practicable but address every issue necessary to final disposition of appeal); *see also Davenport v. Garcia*, 834 S.W.2d 4, 14 n.28 (Tex. 1992) (noting that where the court finds a statute to be unconstitutional under the Texas Constitution, consideration of the federal constitutional question is unnecessary). Moreover, because the Texas Equal Rights Amendment is more extensive and provides more specific protection than the United States equal protection guarantee, we will not address appellants' federal equal protection argument. *See In Re Unnamed Baby McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Finally, because, as noted in part III below, another Texas appellate court has addressed the conflict between section 21.06 and the right of privacy in the Texas Bill of Rights, we will not reexamine that issue.

III.
Texas' Equal Protection

We begin by noting another Texas appellate court has twice declared this statute unconstitutional. *See City of Dallas v. England*, 846 S.W.2d 957 (Tex. App.—Austin 1993, writ

dism'd w.o.j.); *see also State v. Morales*, 826 S.W.2d 201 (Tex. App.—Austin 1992, *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). The *Morales* court found the statute violated the appellees' right of privacy guaranteed by the Texas Constitution, and that court subsequently applied the holding in *Morales* to again invalidate the statute. *See England*, 846 S.W.2d at 958.[1] However, the Texas Supreme Court may have significantly undermined the privacy right announced in *Morales* and *England*. Three years after *England*, the Texas Supreme Court, borrowing heavily from *Bowers v. Hardwick*, 478 U.S. 186 (1986), denied the existence of an asserted privacy right by insisting that the appellant's conduct was "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *See Henry v. City of Sherman*, 928 S.W.2d 464, 470 (1996). Although the Supreme Court never mentioned *Morales* or *England*, its holding clearly implicated the analysis in both cases. For this reason, we limit our analysis to the Texas Equal Rights Amendment.

A. The Arguments

The Texas Equal Rights Amendment (ERA) provides that, "[e]quality under the law shall not be denied or abridged

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[1]Other states that have recently struck down their own homosexual or heterosexual sodomy statutes have done so for the same reason given by the *Morales* court, the right to privacy as protected under each state constitution. *See Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App.–Nashville 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (striking statute on both privacy and equal protection grounds). We look to sibling state jurisprudence as persuasive, but not controlling, authority in our constitutional analysis following the dictates of *Autran v. State*, 887 S.W.2d 31, 37 n.6 (Tex. Crom. App. 1994).

because of sex, race, color, creed, or national origin." TEX. CONST. Art. I, § 3a. Lawrence and Garner assert that section 21.06 of the Penal Code violates the Texas ERA because it proscribes otherwise lawful behavior solely on the basis of the sex of the participants. The challenged statute, bearing the heading "Homosexual Conduct," states: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. [and] (b) An offense under this statute is a Class C misdemeanor." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). "Deviate sexual intercourse" is defined as: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object. *See* TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).[2]

Appellants argue this statute violates the Texas ERA because the same behavior, sodomy, is legal when performed by members of the opposite sex, but illegal when performed by members of the same sex. Thus, the statute criminalizes the conduct solely on the basis of the sex of the participants, thereby violating the Texas ERA prohibition against denying equality under the law on the basis of sex. *See* TEX. CONST. Art. I, § 3a. The State counters this argument first by arguing the State has a legitimate interest in regulating this behavior, and second, that the statute does not discriminate on the basis of gender because the statute is applicable to both men and women.

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[2] In this opinion, we refer to "deviate sexual intercourse" as sodomy. "Sodomy" while variously defined in state criminal statutes, is generally oral or anal copulation between humans. *See* BLACK'S LAW DICTIONARY 1391 (6th ed. 1990).

B. Standard of Review

When a court reviews the constitutionality of a statute, it presumes that the statute is valid. *See HL Farm Corp. v. Self*, 877 S.W.2d 288, 290 (Tex. 1994). If interests other than fundamental rights or a suspect classification are affected, the classification must be rationally related to a legitimate state interest. *See id.* However, "our reading of the Equal Rights Amendment elevates sex to a suspect classification. Sex is clearly listed in the amendment along with other classifications afforded maximum constitutional protection." *McLean*, 725 S.W.2d at 698. Therefore, any classification based upon sex is a suspect classification, and any law or regulation that classifies persons for different treatment on the basis of their sex is subject to strict judicial scrutiny. *See Mercer v. Board of Trustees, North Forest Indep. Sch. Dist.*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). Thus, "any such classification must fall unless the party defending it can show that it is required by (1) physical characteristics, (2) other constitutionally protected rights such as the right of privacy, or (3) other 'compelling reasons.'" *Id.*[3]

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[3] We do not address the first *Mercer* prong because, here, the State never offered any evidence of differing specific physical characteristics of females and males that would serve to vindicate the challenged classification. *See Mercer*, 538 S.W.2d at 206. Neither do we address the second inasmuch as the State does not contend that enforcement of the protection afforded by the ERA would conflict with other fundamental constitutional protections. Therefore, our analysis is limited to the third prong, requiring the State to demonstrate "compelling reasons" for its sex-based classification. *See id.*

C. Analysis

"The first step in a case invoking [the Texas ERA] is to determine whether equality under the law has been denied." *McLean*, 725 S.W.2d at 697.[4] Our next inquiry is whether equality was denied *because of* a person's membership in a protected class of sex, race, color, creed, or national origin. *See id.* Thus, our task becomes an examination of the relevant provisions of the penal code to determine whether Lawrence and Garner are treated differently from others who engage in this activity, solely on the basis of their sex.

Here, the first inquiry is relatively simple. The denial of equality is clearly "under the law" because Lawrence and Garner were prosecuted pursuant to section 21.06 of the Texas Penal Code. *See McLean*, 725 S.W.2d at 697 (noting disparate treatment of illegitimate child's father and mother was required by statute contained in Texas' Family Code, thus the denial of equality was "under the law").

The second inquiry, however, is more complex. As presently constituted, the penal code proscribes sodomy only when performed between individuals of the same sex. *See* TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). This, however, was not always the case. Until 1974, the penal code prohibited oral or anal copulation "with another human being."[5] Thus, the

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[4] *McLean* is the leading case addressing the ERA. The dissent fails to advert to the analysis used there by the Supreme Court. However, *McLean* does not address, as the dissent does, the intent of the ratifiers of the ERA.

[5] Article 524 provided as follows:

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Acts 1943, 48th Leg., ch. 112, § 1, *repealed by* Acts 1973, 63rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

statute prohibited all acts of sodomy, whether performed by members of the opposite or the same sex. *See Pruett v. State*, 463 S.W.2d 191, 193 (Tex. Crim. App. 1970). In 1974, a new penal code was enacted, and as part of a comprehensive reform, many laws concerning sexual behavior were either revised or dropped from the code altogether. *See Baker v. Wade*, 553 F.Supp.1121, 1151 app. A (N.D. Texas 1982). Thus, prohibitions against adultery, fornication, and seduction on promise of marriage no longer existed. *See id.* More importantly for our purposes, although sodomy performed by members of the same sex continued to be proscribed, the same act performed by members of the opposite sex became, for the first time in 114 years, legal. *See id.* at 1148-50.

Therefore, in 1973[6], the Texas Legislature created two standards, demarcated by the sex of the actors: oral and anal intercourse when performed by a man and a woman would henceforth be legal, but oral and anal intercourse performed by two men or two women would remain illegal. Thus, after 1974, the distinction between legal and illegal conduct was not the

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[6] Convening in 1973, the 63rd Legislature, passed the revised Penal Code which was enacted in 1974. Acts 1973, 63rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

act, but rather the sex of one of the participants. Accordingly, we must respond to our second inquiry in the affirmative: Lawrence and Garner are treated differently from others who engage in this activity, solely on the basis of their sex.

Having reached the conclusion that section 21.06 discriminates on the basis of gender, we next focus on whether the discrimination is prohibited by the ERA. *See McLean*, 725 S.W.2d at 697. Because not all gender-based distinctions are prohibited by the ERA, a *per se* standard invalidating all such distinctions is inappropriate. *See id.* at 698. Rather, the standard is one recognizing the ERA does not yield except to compelling state interests. *See id.* Thus, sex-based discrimination is allowed only when the proponent of the discrimination can prove there is no other manner to protect the state's compelling interest. *See id.* Surprisingly, counsel for the State conceded at oral argument that he could not "even see how he could begin to frame an argument that there was a compelling State interest," much less demonstrate that interest for this Court. The State did offer, however, what it characterized as *legitimate* purposes for the statute: enforcement of principles of morality and promotion of family values.[7] Moreover, the State asserts the strict scrutiny we have applied is unwarranted because the statute does not discriminate on the basis of gender since it applies to men and women equally.

The United States Supreme Court discussed the logic of an argument analogous to the State's argument here in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817,18 L.Ed.2d 1010 (1967). There, the State of Virginia argued that Virginia's

[7] It is not enough for the State to say it has an important interest furthered by the discriminatory law because even the loftiest goal does not justify sex-based discrimination in light of the ERA's clear prohibition. *See McLean*, 725 S.W.2d at 698.

miscegenation statutes do not constitute invidious racial discrimination because the statutes apply equally to whites and blacks. *See Loving*, 388 U.S. at 8. The miscegenation statutes, the State contended, penalized both whites who intermarried and blacks who intermarried equally; therefore, the 'equal application' of the statutes rendered them acceptable under the Fourteenth Amendment using a rational basis standard. *See id.* Rejecting this sophistry, the Court responded that the mere equal application of a statute containing racial classifications does not remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations. *See id.* at 8. By using the race of an individual as the sole determinant of the criminality of his conduct the State created and perpetuated an invidious racial classification in violation of the Fourteenth Amendment. *See id.* at 11. Accordingly, the Court reaffirmed the propriety of strict scrutiny and struck the Virginia statutes as unconstitutional. *See id.* at 12.

We also reject the equal application argument offered here. Merely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, does not salvage the discriminatory classification contained in this statute. The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual is the sole determinant of the criminality of the conduct. Applying strict scrutiny to this sex-based classification, and in the absence of any showing by the State of a compelling interest justifying the sex- based discrimination, we hold that section 21.06 of the Texas Penal

Code violates the Texas Equal Rights Amendment's guarantee of equality under the law.[8]

Federal precedent is not controlling when courts consider a case under the Texas Equal Rights Amendment. *See*

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[8] The dissent disagrees with this holding; therefore, we will briefly respond. First, the dissent contends the history of the Texas ERA "suggests the people of this state intended to grant to women the same rights as those already enjoyed by men, not to abolish criminal sanctions imposed for homosexual conduct." The dissent's reliance on the intent of the ratifiers is misguided for one simple reason: "homosexual conduct" was not criminalized at the time of the ERA's ratification in 1972 because in 1972 the prohibition against sodomy applied to all individuals, regardless of their sex. Therefore, the equality mandated by the ERA was not contravened by the then-existing sodomy statute, and whether today's reading of the ERA was foreseen and rejected by Texas voters at the time of its ratification is raw conjecture. *Cf. Meraz v. State*, 785 S.W.2d 146, 153 (Tex. Crim. App. 1990) (noting the effect of voter approval of a 1978 amendment to Article V, section 6 of the Texas Constitution confirmed authority of court of appeals to determine if a jury finding is against the great weight and preponderance of the evidence, *whether the public knew it or not*). Second, the Texas Supreme Court has repeatedly explained that when interpreting the Constitution, "[w]e seek its meaning with the understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time." *Davenport*, 834 S.W.2d at 19. For that reason, when interpreting our state Constitution, we rely heavily on its literal texts, and are to give effect to its plain language. *See The Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89 (1997). Today, we interpret the ERA's plain language to strike down the codified discrimination explicit in the penal code's proscription of "deviate sexual intercourse," the "sex act" at issue, based solely upon the gender of one's sexual partner. Finally, we believe it is not the judiciary's prerogative to condone or condemn a particular lifestyle and the behaviors associated therewith upon the basis of our moral belief. Moreover, it does not follow that simply because the Texas Legislature has enacted as law what may be a moral choice of the majority, the courts are, thereafter, bound to simply acquiesce. *See Gryczan*, 942 P.2d at 125. Our Constitution does *not* protect morality; it does, however, guarantee equality to all persons under the law. *See* TEX. CONST. Art. I, § 3a.

McLean, 725 S.W.2d at 697. Indeed, it is fundamental that state courts be left free and unfettered by the United States Supreme Court in interpreting their state Constitutions. *See Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). Our decision is based on adequate and independent state grounds, and any federal cases are used for guidance only and do not themselves compel the result this court has reached. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). As set forth above, our holding regarding the unconstitutionality of Penal Code section 21.06 is based solely on the Texas Equal Rights Amendment.[9]

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[9] The dissent relies upon the opinion in *Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985) as precedent for its argument that section 21.06 does not constitute sex-based discrimination. We disagree that *Boutwell* affects in any way our disposition of this appeal for three reasons. First, *Boutwell* was concerned not with the statute at issue here, but rather with another, repealed, statute containing a sex-based classification. That statute related to the defense of promiscuity which was available only to those defendants who sexually assaulted a child of the opposite sex. However, because the Legislature repealed the statute at issue in *Boutwell* and the Court of Criminal Appeals has since disavowed *Boutwell*, we do not consider it to have significant precedential value today. *See Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992). Second, *Boutwell* mentioned section 21.06 in dicta as support for its rejection of Boutwell's argument that he was denied equal protection of the law by the unavailability of the promiscuity defense because he had assaulted a male child. The majority merely mentioned section 21.06 to demonstrate that the State had made homosexual conduct a crime, thus Boutwell's "sex act" was not a protected activity under the ERA. While this observation is interesting, it is of no moment here because the question at bar today is not whether the ERA protects homosexual conduct, but whether the criminalization of sodomy by same sex partners only can withstand scrutiny under the ERA. As discussed more fully above, we hold it c an not. Third, in *Boutwell*, Judge Clinton effectively neutralized any value the opinion might have had regarding the constitutionality of section 21.06 by indicating that any constitutional infirmities infecting that statute were not considered by the court because they were not advanced by Boutwell in his appeal. *See id.* This is not the case here. Appellants Lawrence and Garner have effectively advanced both logic and authority for their constitutional attack on section 21.06. Based on

We reverse the judgments of the trial court, dismiss the complaints, and render judgments of acquittal.

/s/ John S. Anderson
Justice

Judgment rendered and Majority and Dissenting Opinions filed June 8, 2000.
Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.
Publish — TEX. R. APP. P. 47.3(b).

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these core distinctions, we will not, as the dissent has, apply the analysis in *Boutwell*.

Reversed and Rendered and Majority and Dissenting Opinions filed June 8, 2000.

In The

Fourteenth Court of Appeals

NOS. 14-99-00109-CR & 14-99-00111-CR

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause No. 98-48530

DISSENTING OPINION

Because I do not believe the people of this state intended to decriminalize homosexual conduct when they approved the Texas Equal Rights Amendment, I respectfully dissent.[1]

The State of Texas contends that Section 21.06 of the Penal Code does not discriminate on the basis of gender because it applies equally to men and women, i.e., it is just as unlawful for men to engage in homosexual conduct as it is for women. The majority rejects the State's contention because a similar argument was rejected by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967).

In *Loving*, the issue before the court was the constitutionality of Virginia's miscegenation statute which imposed severe criminal penalties for interracial marriage. The State of Virginia argued the statute did not discriminate on the basis of race because it applied with equal force to both whites and blacks, i.e., it was just as unlawful for a white person to marry a black person as it was for a black person to marry a white person. The court rejected the argument because it concluded the Equal Protection Clause of the Fourteenth Amendment was specifically intended to eliminate the type of racial discrimination inherent in Virginia's miscegenation statute. However, because the Texas Equal Rights Amendment was never intended to decriminalize homosexual conduct, *Loving* is distinguishable.

The Fourteenth Amendment was part of a series of proclamations, statutes, and amendments designed to eradicate slavery and any collateral discrimination incident thereto. In

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[1] The amendment provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a.

1863, while the outcome of the civil war remained very much in doubt, President Lincoln issued his Emancipation Proclamation purporting to free slaves found within the confederate states. In 1865, just months after General Lee surrendered his forces at Appomattox, the Thirteenth Amendment was adopted; it declared that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." But while the abolition of slavery had been constitutionally mandated, former slaves were still subjected to serious abuses. Individual southern states began enacting the so-called Black Codes which were designed to repress their black citizens and very nearly resurrect the institution of slavery. *See City of Memphis v. Greene*, 451 U.S. 100, 132 (1981) (White, J., concurring).

In response to these events, the Republican Congress passed the Civil Rights Act of 1866 in an attempt to ensure equal rights for former slaves. *See General Bldgs. Contrs. Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). In 1868, the Fourteenth Amendment was adopted and its Equal Protection Clause enjoined the states from denying to any person the equal protection of the laws. Finally, in 1870, the Fifteenth Amendment declared that the right of citizens to vote could not be denied or abridged on "the account of race, color, or previous condition of servitude.

Thus, the Fourteenth Amendment was part of a concerted effort to eliminate the lingering vestiges of slavery. In *Loving*, the Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "[p]enalties for miscegenation arose as an incident to slavery." *Loving*, 388 U.S. at 6. Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional. *Id.*, at 10.

But while the original intendment of the Fourteenth Amendment validates its application to Virginia's miscegenation statute, appellants have produced no evidence to show the Texas Equal Rights Amendment was ever intended to decriminalize homosexual conduct. Rather, appellants contend we should blindly adhere to the bare words of the amendment, giving them absolute effect. The irony, of course, is that this is the very argument employed by those who sought to defeat the amendment almost thirty years ago. Opponents of the amendment, for example, theorized it would mandate the construction of unisex restrooms in schools and government buildings, prohibit the segregation of male and female prisoners, decriminalize homosexual conduct, and legalize same-sex marriages. Most supporters of the amendment not only rejected this construction, they ridiculed it.[2] Now, however, after time has begun to obscure the original intent of the amendment, what was considered a highly unlikely, if not farcical interpretation, has been embraced by the majority.

The Texas Constitution derives its force from the people of Texas. *See Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). Thus, the "preeminent goal of constitutional interpretation is to give effect to the intent of

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[2] A full decade after the amendment was adopted, one writer humorously observed: Despite predictions to the contrary, the sex equality provision of the Texas Equal Rights Amendment (Texas ERA) has not established unisex bathrooms, has not approved marriage between persons of the same sex, has not invalidated sex offenses, has not relieved husbands and fathers of support obligations to their wives and children, has not forced homemakers into the labor force, has not rendered Texans sexless, and has not destroyed the social fabric of the state. The Alamo still stands in San Antonio. Rodric B. Schoen, *The Texas Equal Rights Amendment After the First Decade: Judicial Developments 1978-1982*, 20 HOUS. L. REV. 1321 (1982).

the people who adopted the constitution." *In the Interest of J.W.T.*, 872 S.W.2d 189, 205 (Tex. 1994).[3] In determining the meaning, intent and purpose of a constitutional provision, "the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are proper subjects of inquiry. *Markowsky v. Newman*, 136 S.W.2d 808, 813 (Tex.1940). I believe the history and manifest purpose of the Texas Equal Rights Amendment compel a different result.

After a lengthy struggle for suffrage, women obtained the right to vote in 1920 with the ratification of the Nineteenth Amendment to the federal constitution.[4] Although this was an important milestone, women still did not enjoy all the legal rights afforded to men. Building upon their success, women sought to rectify these inequities as early as 1923 by way of an "equal rights amendment" to the federal constitution.[5] Although initial efforts were unsuccessful, Congress finally

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[3] "[T]he intention of the framers of a constitution is of but little importance–the real question being, what did the people intend by adopting [the constitutional] language submitted to them?" *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 (Tex. Crim. App. 1993) (quoting *Smissen v. State*, 71 Tex. 222, 9 S.W. 112, 116 (1888).

[4] The amendment provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIX.

[5] Barbara Karkabi, *Equal Rights Amendment backers renew efforts*, HOUS. CHRON., Feb. 22, 1989, Houston Section, at 1.

proposed such an amendment on March 22, 1972.[6] Needing the approval of 38 states for ratification, the passage of the federal equal rights amendment was, from the outset, uncertain. Undaunted, and proceeding simultaneously on "two fronts," efforts were made to add similar amendments to the state constitutions.

In Texas, the 62nd Legislature proposed, by joint resolution, an equal rights amendment to the Texas Constitution and ordered that the proposition be placed on the ballot.[7] Although inclusion of the terms "race, color, creed, or national origin," in addition to "sex" made the proposed amendment broader than its federal counterpart, its fundamental purpose was identical to the federal equal rights amendment.[8] Stated simply, the goal of the federal equal rights amendment was to guarantee that "[m]en and women shall have equal rights under

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[6] The proposed amendment stated:

> 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

John J. Sampson, *The Texas Equal Rights Amendment and the Family Code: Litigation Ahead*, 5 TEX. TECH L. REV. 631, 632 n.5 (1974).

[7] The ballot proposal stated:

> The constitutional amendment to provide that equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.

Tex. S.J. Res. 16, 62nd Leg., R.S., 1971 Tex. Gen. Laws 4129.

[8] Sampson, at 633.

the law in the United States."[9] Thus, shortly before the election, the Houston Post referred to the Texas proposition as "the so-called women's rights amendment," and said the "amendment is designed to supplement the federal guarantees of equal treatment in the 14th Amendment and the Civil Rights Act."[10] The Dallas Morning News reported that the stated aim of both the state and federal equal rights amendments was "to prove that it is legitimate for women to try to do whatever they want" and put a stop to "men who have tried to keep women down."[11] Thus, when on November 7, 1972, the people of this state overwhelmingly approved the Texas Equal Rights Amendment, it was with the intent of promoting *equality* under the law as between men and women.

Although appellants have attempted to frame their challenge to Section 21.06 of the Penal Code in terms of gender discrimination, their true ground for complaint is that the statute criminalizes certain homosexual conduct that, in a heterosexual setting, would be perfectly legal. However, homosexual conduct is not a constitutionally protected liberty interest, nor do homosexuals constitute a suspect or quasi-suspect class. *See Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985). More importantly, the 6 history of the Texas Equal Rights Amendment suggests the people of this state intended to grant to women the same rights as those already enjoyed by men, not to abolish criminal sanctions imposed for homosexual conduct.

Accordingly, I believe the State's argument has merit;

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[9] Karkabi, at 1.

[10] *Post/Commentary*, HOUS. POST, Nov. 4, 1972, at 6/B.

[11] Kay Crosby Ellis, *Stamp of legitimacy for women necessary*, DALLAS MORNING NEWS, Nov. 4, 1972, at 4/C.

the so-called sodomy statute does not violate the Texas Equal Rights Amendment because it does not discriminate on account of gender. Moreover, the State's position cannot be rejected simply because a similar argument was, in a different context, rejected in by the Supreme Court in *Loving v. Virginia*. In fact, long after the decision in *Loving*, the Texas Court of Criminal Appeals adopted the same argument advanced here. *See Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985).

In *Boutwell*, the Court of Criminal Appeals considered the applicability of the Texas Equal Rights Amendment to Section 21.10 of the Penal Code. Until its repeal in 1983, the statute provided legal defenses to certain heterosexual acts that were specifically denied in the context of homosexual acts. The statute provided:

> A person commits an offense if, with the intent to arouse or gratify the sexual desire of any person, he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and the child is younger than 17 years.
>
> It is a defense to prosecution under this section that *the child was of the opposite sex*, was at the time of the alleged offense 14 years or older, and had, prior to the alleged offense, engaged promiscuously in sexual intercourse or deviate sexual intercourse.
>
> It is an affirmative defense to prosecution under this section that *the actor was of the opposite sex* and was not more than two years older than the victim.

Act of May 24, 1973, 63 rd Leg., R.S., ch. 399, § 21.10, 1973 Tex. Gen. Laws 918. (Emphasis added). When Lester Boutwell

was charged with sexual abuse of several boys, he argued the above statute was unconstitutional under the Texas Equal Rights Amendment because it discriminated against him on the basis of sex. *See Boutwell*, 719 S.W.2d at 167. The Court of Criminal Appeals rejected the contention, stating:

> But clearly, a female defendant situated similarly to appellant—that is, a female who had engaged in deviate sexual intercourse with a child 14 years or older who was of the same sex—would likewise be denied the "promiscuity" defense under § 21.10. Thus, appellant's reasoning proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of "sex" in the sense of "gender;" but rather, that his "sex" *act* is entitled to protection equal to that given heterosexual conduct under the law as stated in § 21.10(b).

Id. at 169; *see also Boulding v. State*, 719 S.W.2d 333 (Tex. Crim. App. 1986). [12]

In a slightly different context, appellants' argument has also been rejected by the Washington Court of Appeals. *See Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974, pet. denied). When two men were denied a marriage license in the State of Washington, they challenged the constitutionality of the prohibition on the basis that such prohibition violated the Washington Equal Rights Amendment. *Id.* Like the Texas

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[12] *Boutwell* has been severely criticized, but on different grounds than those at issue here. *See McGlothlin v. State*, 848 S.W.2d 139, 138 (Tex. Crim. App. 1992); *Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992).

Constitution, the Washington amendment provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." *Id.* at 1190.[13]

The Washington court rejected the contention on the theory that the approval of the ERA by the people of Washington did not reflect any intention on their part to offer homosexual couples the protection of marriage laws. *Id.* at 1193-94. Rather, the court held that "the purpose of the ERA is to provide the legal protection, as between men and women, that apparently is missing from the state and federal Bills of Rights, and it is in light of that purpose that the language of the ERA must be construed." *Id.* at 1194. Holding that the primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women on account of sex, the court wrote:

> To accept the appellants' contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment.

Id.

I have no quarrel with the majority's conclusion that gender is a "suspect classification" under the Texas Equal Rights Amendment. *See Barber v. Colorado I.S.D.*, 901 S.W.2d

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[13] The same argument advanced by appellants applies equally well against this state's prohibition of same-sex marriages. *See* TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).

447, 452 (Tex. 1995). However, I do not believe Section 21.06 of the Penal Code discriminates on the basis of gender, but only on the basis of sex acts that the people of this state did not intend to include within the ambit of the amendment. To the extent the statute discriminates against homosexuals, the statute is valid if the State can show it is rationally related to any legitimate state interest.

One fundamental purpose of government is "to conserve the moral forces of society." *See Grigsby v. State*, 105 Tex. 597, 153 S.W. 1124, 1129 (Tex. 1913). Thus, the state is charged with the responsibility of protecting virtue and restraining evil. While the morality of homosexual conduct is much debated, the Legislature has considered the issue and deemed the conduct iniquitous. This determination rests with the Legislature alone—the courts may intervene only if the decision is clearly arbitrary or unreasonable. Here, the Legislature's decision, far from being arbitrary, is bolstered by considerable historical precedent.

In his sixteenth-century magnum opus on the essence of law, Montesquieu observes that "the crime against nature" is a "crime, which religion, morality, and civil government equally condemn."[14] Certainly, sodomy is severely denounced in the orthodox doctrines of both Judaism and Christianity.[15] Likewise, governments have long attempted to repress homosexual behavior. Under Roman law, Justinian states that

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[14] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Dublin 1751).

[15] After condemning incest and adultery, the Book of Leviticus states: "Do not lie with a man as one lies with a woman; that is detestable." *Leviticus* 18:22 (New International). Similar condemnations are found in the New Testament, as well. *See* 1 *Corinthians* 6:10.

the lex Iulia imposed severe criminal penalties against "those who indulge in criminal intercourse with those of their own sex."[16] Blackstone states that the "infamous crime against nature, committed either with man or beast" was a grave offense among the ancient Goths and that it continued to be so under English common law at the time of his writing.[17]

In America, homosexual conduct was classified as a felony offense from the time of early colonization.[18] Further, in Texas, homosexual conduct has been a criminal offense for well over a century.[19] In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. *See Bowers v. Hardwick*, 478 U.S. 186, 193 (1986).

Historical abhorrence of homosexual conduct is not, of course, necessarily derived from, nor does it constitute proof of, the moral or immoral character of the activity. If good and evil are to be anything other than relative, highly mutable concepts, they must rest upon divinely instituted principles. Thus, secular laws based upon moral rectitude can rarely, if ever, be justified by physical proofs which no one can dispute; what some hold

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[16] *See* FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 205 (J. B. Moyle trans., 5 th ed., Oxford 1913).

[17] 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16.

[18] *See* LAWS AND LIBERTIES 5 (Cambridge 1648) (collection of the general laws of the Massachusetts Bay Colony).

[19] *See* Tex. Penal Code art. 342 (1879); Tex. Penal Code art. 364 (1895); Tex. Penal Code art.507 (1911); and Tex. Penal Code art. 524 (1925).

as moral insight will always be dismissed by others as mere prejudice. Nevertheless, most, if not all, of our law is "based on notions of morality." *See Bowers*, 478 U.S. at 196. The legislature has outlawed behavior ranging from murder to prostitution precisely because it deemed these activities to be moral transgressions. Even our civil law is based on concepts of fairness derived from a moral understanding of right and wrong. While it is by no means infallible in its ethical judgments, the Legislature is charged with the responsibility of preserving the morals of a civil society. Thus, the police power of a state may be legitimately exerted in the form of legislation where such statute bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. *See Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928).

The modern trend in the law has been to decriminalize all forms of consensual sexual conduct even though such behavior may be widely and justifiably perceived as immoral. Whether this trend will ultimately encompass homosexual conduct remains to be seen. Like former criminal prohibitions against adultery and fornication, the Legislature may ultimately choose to repeal the criminal sanctions now imposed against homosexual conduct. On the other hand, to preserve fundamental morals, the Legislature may choose to not only retain the sanctions against homosexual conduct, but also reinstate penalties for other forms of consensual sexual conduct that are currently permissible under the law. In other words, such decisions are the prerogative of the Legislature alone—they should not be imposed by judicial fiat. As a court, we must presume the legislature has correctly assessed the moral repugnance of activities it has chosen to penalize with criminal sanctions. Accordingly, we must assume for the purposes of our analysis that homosexual conduct is morally reprehensible.

I believe the State of Texas has demonstrated it has a legitimate state interest in criminalizing homosexual conduct because (1) it is charged with the responsibility of preserving the public morals, and (2) homosexual conduct represents a gross deviation from historical perceptions of morality. Therefore, I must respectfully dissent.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed June 8, 2000.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
Publish — TEX. R. APP. P. 47.3(b).

Appendix E

JUDGMENT ON PLEA OF GUILTY/NOLO CONTENDERE/GUILTY BEFORE COURT—WAIVER OF JURY TRIAL

CAUSE NO. 9848530

THE STATE OF TEXAS
VS.
John Geddes Lawrence
(Name of Defendant)
AKA

IN THE _____ DISTRICT COURT
COUNTY CRIMINAL COURT AT LAW NO. 10
OF HARRIS COUNTY, TEXAS

Judge Presidiary: S Ross
Attorney for State: A Bequero
Attorney for Defendant: E. M. Katine
☐ Defendant Waived Counsel
Offense Convicted of: Homosexual Conduct.

Date of Judgment: DEC 22 1998
Date Sentence Imposed: DEC 22 1998
Sentence to Begin Date: DEC 22 1998
Date of Offense: 9-17-98

☒ A MISDEMEANOR, CLASS: A | B | (C) ☐ A FELONY, DEGREE: SJ | 3rd | 2nd | 1st | CAPITAL

Terms of Plea Bargain (In Detail): $200.00 fine

(Circle appropriate selection – N/A = not available or not applicable)

Plea to Enhancement Paragraph(s): 1st Paragraph True | Not True | (N/A) 2nd Paragraph True | Not True | (N/A) Charging Instrument: (Complaint) | Indictment | Information

Findings on Enhancement(s): 1st Paragraph True | Not True | (N/A) 2nd Paragraph True | Not True | (N/A) Plea: Guilty | (Nolo Contendere) | Not Guilty

Affirmative Findings: Deadly Weapon: Yes | No | (N/A) Family Violence: Yes | No | (N/A) Hate Crime: Yes | No | (N/A)

Punishment Imposed and Place of Confinement:

(Mark all that apply)
☐ Institutional Division, TDCJ
☐ State Jail Division, TDCJ
☐ Harris County Jail
☒ Fine Only
☐ Sentence suspended, Defendant placed on community supervision for —
☐ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

☒ Plea in the Amount of $ 200.00

Time Credited: — days toward incarceration — days toward fine and costs — days toward incarceration, fine and costs

COURT COSTS: $ 141.25

(Mark appropriate selections below, if applicable)
☐ Name changed from —
☐ Judgment Addendum incorporated herein by reference.
☐ Driver's license is suspended for a period of — days/months/years.

RECORDER'S MEMORANDUM: This instrument is of poor quality and not satisfactory for photographic reproduction and for clarity.

V2594 P0332

☐ The Defendant is entitled to _____ days credit toward suspension of driver's license.

☐ It is ordered by the Court, that any weapon(s) seized in this case before hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 13 (h), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(a), Penal Laws of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

This cause being called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above, and both parties announced ready for trial. The Defendant waived his right of trial by jury, and pleaded as indicated above. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the Court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the consequences of his plea; the plea is hereby received by the Court and entered of record. The Court having heard the evidence submitted, found the Defendant guilty of the offense indicated above. The Defendant was granted the right of allocution and entered nothing in bar thereof. The Court proceeded to the presence of the Defendant to pronounce sentence against the Defendant.

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, and that the Defendant committed the offense on the date indicated above, and that the Defendant be punished as indicated above for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of this prosecution for which execution will issue. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of Art. 42.12, Sec. 9, Code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail that the Defendant is committed to the custody of the Sheriff of Harris County, Texas, unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail for the period indicated above, and until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause, unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on DEC 22 1998

Community Supervision Expires on: _____

X _____ PRESIDING JUDGE

Notice of Appeal: DEC 22 1998

Mandate Received: _____

After Mandate Received, Sentence to Begin Date is: _____

Received on _____ at _____ AM | PM.
Sheriff, Harris County, Texas

By: _____ Deputy

SPECIAL INSTRUCTION OR NOTES: _____

Received 23 Dec 98
Verified
LCBT
LCBV

Right Thumbprint

V2504 P0333

JUDGMENT ON PLEA OF GUILTY/PLEA OF CONTENDERE/FINDING OF GUILTY
BEFORE COURT—WAIVER OF JURY TRIAL

CAUSE NO. 984853 1

THE STATE OF TEXAS
VS.
Tyson Hansen
(Name of Defendant)

IN THE _____ DISTRICT COURT

COUNTY CRIMINAL COURT AT LAW NO. 10

OF HARRIS COUNTY, TEXAS

AKA _____

Judge Presiding: D Bass
Attorney for State: A Briones
Attorney for Defendant: M. Katine ☐ Defendant Waived Counsel
Offense Committed on: Harassment Conduct

Date of Judgment: DEC 22 1998
Date Sentence Imposed: DEC 22 1998
Sentence to Begin Date: DEC 22 1998
Date of Offense: 9-17-98

X A MISDEMEANOR, CLASS A | B | C ☐ A FELONY, DEGREE SJ | 3rd | 2nd | 1st | CAPITAL

Class of Plea Bargain (In Detail): $200.00 fine

(Circle appropriate selection -- N/A = not available or not applicable)

Plea to Enhancement Paragraph(s): 1st Paragraph True | Not True | N/A; 2nd Paragraph True | Not True | N/A

Charging Instrument: Complaint | Indictment | Information

Findings on Enhancement(s): 1st Paragraph True | Not True | N/A; 2nd Paragraph True | Not True | N/A

Plea: Guilty | Nolo Contendere | Not Guilty

Affirmative Findings: Deadly Weapon: Yes | No | N/A; Family Violence: Yes | No | N/A; Hate Crime: Yes | No | N/A

Punishment Imposed and Place of Confinement: (Mark all that apply)
☐ Institutional Division, TDCJ
☐ State Jail Division, TDCJ
☐ Harris County Jail
☐ Sentence suspended, Defendant placed on community supervision for _____
☐ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

X Fine in the Amount of $ 200.00
X Fine Only

Time Credited: _____ days toward incarceration _____ days toward fine and costs _____ days toward incarceration, fine and costs

COURT COSTS: $ 141.25

(Mark appropriate instructions below, if applicable)
☐ Name changed from _____
☐ Judgment Addendum incorporated herein by reference.
☐ Driver's license is suspended for a period of _____ days/years (circle one).

RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic recordation, and/or other reproduction was present at the time of filing.

0000

TDCD 807/33/98 1

V2504 P0296

☐ The Defendant is entitled to _____ days credit toward suspension of driver's [illegible]

☐ It is ordered by the Court, that any weapon(s) seized in this case is/are hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 13 (h), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(a), Penal Laws of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

This cause being called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above, and both parties announced ready for trial. The Defendant waived his right of trial by jury, and pleaded as indicated above. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the Court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the consequences of his plea, the plea is hereby received by the Court and entered of record. The Court having heard the evidence submitted, found the Defendant guilty of the offense indicated above. The Defendant was granted the right of allocation and answered nothing to her thereof. The Court pronounced in the presence of the Defendant to prosecute sentence against the Defendant.

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, and that the Defendant committed the offense on the date indicated above, and that the Defendant be punished as indicated above for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution for which execution will issue. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of Art. 42.12, Sec. 9, Code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas, unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail for the period indicated above, and until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine fully, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause; unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, or be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the judgment [illegible] that the sentence is to run consecutively.

Signed and entered on DEC 22 1998

Community Supervision Expires on: _____ X _____ PRESIDING JUDGE

Notice of Appeal: DEC 22 1998

Mandate Received: _____

After Mandate Received, Sentence to Begin Date is: _____

Received on _____ at _____ AM | PM.
Sheriff, Harris County, Texas

By: _____ Deputy

SPECIAL INSTRUCTION OR NOTES: _____

Entered 03/[illegible]/999
Verified [illegible]
LCBT [illegible]
LCBU [illegible]

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V2594 P0297

Appendix F

HEARING TRANSCRIPT
MOTION TO QUASH THE COMPLAINTS
DECEMBER 22, 1998

IN THE COUNTY CRIMINAL COURT
AT LAW NO. 10
HARRIS COUNTY, TX
Hon. Sherman A. Ross

THE STATE OF TEXAS
vs.
JOHN GEDDES LAWRENCE
CAUSE NO. 9848530

THE STATE OF TEXAS
vs.
TYRON GARNER
CAUSE NO. 9848531

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

The Court: This is cause number 9848530 and 9848531. The State versus John Geddes Lawrence and Tyrone Garner. The Court has before it a motion, I believe, a Motion to Quash.

Mr. Katine: Mr. Lawrence is present, Judge, with Counsel and Mr. Garner is present. Your Honor, the first motion we have on behalf of Tyrone Garner and John Geddes Lawrence, is a Motion to Participate of Suzanne Goldberg. We'd like to move that she be permitted to participate as the Counsel on behalf of the Defendants along with David Jones and Mitchell Katine.

The Court: That'll be granted.

Ms. Goldberg: Your Honor, we would like to offer the Exhibits, the . . .

Ms. Beaver: Judge, I believe there is a Motion to Quash in front of you. It was filed on December 16th, 1998. The State at this time will waive any kind of time requirements for notice. We've had plenty of time to look at the Motion and we're prepared to proceed today.

The Court: All right, I've made a docket notation and the Court finds that there is good cause to proceed today.

Ms. Goldberg: Thank you, Your Honor. Defendants Garner and Lawrence would now like to offer into evidence the Probable Cause Affidavit and the Complaint charging both of them, each of them, with violation of Penal Code 2106, the Homosexual Conduct Statute. The Probable Cause Affidavit charging John Geddes Lawrence, Defendant's Exhibit One in

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

his case and the Complaint is Defendant's Exhibit Two for Lawrence.

The Court: Any objections?

Ms. Beaver: The State has no objections to Defendant's Exhibits One and Two in each cause number.

The Court: All right, they'll be admitted.

Ms. Goldberg: And likewise, the Probable Cause Affidavit for Garner is Defendant's Exhibit One and the Complaint is Defendant's Exhibit Two.

The Court: All right. That's also admitted.

Ms. Goldberg: Your Honor, you have before you our Motions to Quash the charges against both Defendants on constitutional grounds and we have agreed, together with the Prosecution, to waive arguments.

The Court: All right. The Court has reviewed the Motions and considered same and respectfully denies them.

Mr. Katine: I think there are Orders in both eases.

The Court: All right.

Ms. Goldberg: Your Honor, our clients have reached an agreement with the Prosecutor and are prepared to enter a plea at this time.

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

The Court: I understand that there is a plea bargain as to the client's plea at this time?

Ms. Beaver: There is, Your Honor.

The Court: All right. Let me ask them individually what their pleas are. Mr. Garner.

Mr. Garner: Yes, sir.

The Court: How do you plead, sir?

Mr. Garner: No Contest.

The Court: Mr. Lawrence?

Mr. Lawrence: No Contest.

The Court: All right. I need to hear some prima facia facts. Very briefly.

Ms. Beaver: If I may have the exhibits.

The Court: Can we have an agreement that the facts for one would be the facts for both.

Ms. Goldberg: Yes, Your Honor.

The Court: All right.

Ms. Beaver: Your Honor, officers were dispatched to 794 Normandy, # 833, in reference to a weapons disturbance. The

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

reportee had advised dispatch that a black male was going crazy in the apartment and was armed with a gun. Officers met with the reportee who directed the officers to the upstairs apartment. On entering the apartment and conducting a search for the armed suspect, officers observed the Defendants engaged in deviate sexual conduct, namely, oral sex. I'm sorry, anal sex. Both Defendants were engaged in deviate sexual conduct.

The Court: All right. I find you Guilty. What type of agreement have you reached in punishment?

Ms. State: On each case, Your Honor, we've reached an agreement for a $200.00 fine.

The Court: Is that your understanding, Mr. Jones ?

Mr. Jones: Yes, it is.

The Court: Okay. Ms. Goldberg?

Ms. Goldberg: Yes, it is, Your Honor.

The Court: Mr. Katine?

Mr. Katine: Yes, it is.

Ms. Goldberg: Just one more matter, Your Honor, which is that we would move to allow the original bond to remain in effect for both Defendants as their appeal bonds.

The Court: All right. That will be a house keeping matter that we'll take up with the clerk. We also will need written

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

notice on this.

Mr. Katine: I have it prepared, Your Honor.

The Court: Do you? All right. Okay. I'm ready sentence both the Defendants. Mr. Garner, having been found Guilty of the offense of Homosexual Conduct, the Court assesses your punishment at $200.00.

Mr. Lawrence, having been found Guilty of the offense of Homosexual Conduct, the Court assesses your punishment at $200.00. All right. This hearing is concluded.

Appendix G

CAUSE NO. 98-48530

THE STATE OF TEXAS	§	IN THE COUNTY
	§	CRIMINAL COURT
	§	
VS.	§	AT LAW NUMBER FIVE (5)
	§	
JOHN GEDDES	§	
LAWRENCE	§	HARRIS COUNTY, TEXAS

DEFENDANT'S MOTION TO QUASH COMPLAINT/INFORMATION UNDER TEXAS PENAL CODE §21.06

TO THE HONORABLE JUDGE OF THE COUNTY CRIMINAL COURT:

NOW COMES John Geddes Lawrence, defendant in the above-referenced cause, by and through his attorney of record, and files this motion to set aside and quash the complaint/information against him based on Texas Penal Code §21.06. As he argues below, the statute is unconstitutional on its face and as applied to him. First, it violates Mr. Lawrence's right to equal protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under the Equal Rights Amendment of Article 1, Section 3a and the equal rights provision of Article 1, Section 3 of the Texas Constitution. Second, §21.06 violates Mr. Lawrence's right to privacy guaranteed by the Bill of Rights and Fourteenth Amendment of the United States Constitution and by the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution. For the following reasons, the

complaint/information against Mr. Lawrence should be quashed:

1. Defendant Lawrence was arrested and charged with violating Texas Penal Code §21.06, entitled the "Homosexual Conduct" statute.
2. Texas Penal Code §21.06, a class C misdemeanor, provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."
3. Texas Penal Code §21.01 defines "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."
4. Thus, neither use of force nor occurrence in a public place is an element of the "Homosexual Conduct" crime.
5. The complaint/information states that Mr. Lawrence "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The complaint/information is attached hereto at Tab A.
6. The police report that forms the basis of the §21.06 charge states that Mr. Lawrence engaged in sexual relations with another man inside that man's home. Consistent with the elements of the crime under §21.06, the report contains no allegations of force or monetary exchange between Mr. Lawrence and the other man. The police report is attached hereto at Tab B.
7. The criminal charges against Mr. Lawrence under §21.06 rests solely on consensual, adult, private sexual relations with another person of the same sex.

Equal Protection and Equal Rights Amendment Violations

8. The "Homosexual Conduct" statute, Tex. Penal Code §21.06, classifies and criminalizes consensual sexual acts, including those in private, according to the sex and sexual orientation of those who engage in them.

United States Constitutional Claim

9. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without an important or exceedingly persuasive purpose that is substantially or closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
10. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a legitimate or more substantial purpose that is rationally or more closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
11. In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court explained that governmental discrimination based on sex is impermissible unless the classification is "'substantially related'" to achieving an "exceedingly persuasive" justification. *Id.* at 533 (citation omitted). Here, no such justification exists for a law that criminalizes acts according to the sex of those who engage in them.
12. The United States Supreme Court emphasized in *Romer v. Evans*, 517 U.S. 620 (1996), that the Constitution "'neither

knows nor tolerates classes among citizens.'" *Id.* at 623 (citation omitted). Section 21.06, like the amendment singling out and disadvantaging lesbians, gay men, and bisexuals that was invalidated in *Romer*, lacks a legitimate purpose, much less a more substantial state interest, for its discriminatory classification against gay people.

Texas Constitutional Claims

13. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without the classification being narrowly tailored to serve a compelling government interest, Texas Penal Code §21.06 violates Article 1, Section 3a of the Texas Constitution, known as the Equal Rights Amendment, as well as Article 1, Section 3 of the Texas Constitution.
14. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a constitutionally sufficient justification for that classification, Texas Penal Code §21.06 violates Article 1, Sections 3 and 3a of the Texas Constitution.
15. As the Texas Supreme Court explained in *In re McLean*, 725 S.W.2d 696 (1987), the state can justify a sex-based classification under the Equal Rights Amendment to the Texas Constitution "only when . . . there is no other manner to protect" a compelling state interest. Id. at 698. No such need can be shown here.
16. Likewise, in *State v. Morales*, 826 S.W.2d 201, 204 (Tex. App.-Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Texas 1994), the court observed that "the State cannot make the same conduct criminal when done by one, and innocent when done by the other." No legitimate, much less more substantial state purpose, justifies the

"Homosexual Conduct" law's punishment directed uniquely at gay Texans, such as Mr. Lawrence.

Right to Privacy Violations

17. The right to privacy guarantees individuals protection from state interference in personal, important decisions about their most intimate relationships and the ways in which they choose to express themselves through consensual sexuality. The freedom to make such decisions without state interference is particularly strong in one's own home and in other similarly private settings.

United States Constitutional Claims

18. Because it intrudes upon and imposes criminal sanctions on the private expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Lawrence's right to privacy under the Bill of Rights (including the First, Fourth, Fifth and Ninth Amendments) and the Fourteenth Amendment of the United States Constitution.
19. The United States Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld Georgia's sodomy statute against a privacy challenge, has been widely criticized by scholars and was wrongly decided. *See, e.g.*, Laurence H. Tribe, American Constitutional Law, 1422-1435 (2d ed. 1988). Indeed, the U.S. Supreme Court's "cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of*

Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986). And as noted below, the statute at issue in *Hardwick* has been struck down by the Georgia Supreme Court. When properly construed, the U.S. Constitution's right to privacy protects the right of individuals, including Mr. Lawrence, to make deeply personal decisions about private sexual intimacy; §21.06 infringes that protection.

Texas Constitutional Claims

20. Because it intrudes upon and imposes criminal sanctions on the private consensual expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Lawrence's right to privacy under the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution.
21. As the Texas Court of Appeals explained in *State v. Morales*, 826 S.W.2d at 204, "we can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private." *See also Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) (recognizing right to privacy under Texas Constitution); *cf. Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (Texas Constitution can provide greater rights than U.S. Constitution). The *Morales* court then held that no compelling government interest justified that infringement of privacy rights. Similarly, the right to privacy here invalidates §21.06.

* * *

22. Appellate courts in other states have invalidated statutes similar to §21.06 as violating their state constitution's

privacy and equal protection guarantees. In *Gryczan v. State*, 942 P.2d 112 (1997), the Montana Supreme Court struck down that state's statute criminalizing same-sex sexual relations, stating that "[t]he right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy." *Id.* at 125. *See also Powell v. State*, ___ S.W.2d ___, WL 804569 (Ga. Nov. 23, 1998) (holding Georgia's law invalid under state constitution's privacy guarantee); *Campbell v. Sundquist*, 926 S.W.2d 250, 162 (Tenn. Ct. App. 1996)(invalidating Tennessee's "Homosexual Conduct" law on privacy grounds). In *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993), the Kentucky Supreme Court struck down that state's law criminalizing same-sex sexual relations as violating the state constitution's equal protection and privacy guarantees.

23. Mr. Lawrence is prepared to offer further briefing on all of the above points, should that be of assistance to the Court.

WHEREFORE, PREMISES CONSIDERED, defendant prays that after notice and hearing, and consideration of his Motion to Quash, it be determined that Texas Penal Code

§21.06 is unconstitutional on its face and as applied to him and that his Motion to set aside the complaint/information be granted.

RESPECTFULLY SUBMITTED,

WILLIAMS, BIRNBERG &
ANDERSEN, L.L.P.

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Fax: (713) 981-8670

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Proceedings pending)

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TAB A

CASE NO. CR31C1000002

IN THE JUSTICE COURT OF
HARRIS COUNTY, TEXAS
PRECINCT 3, POSITION 1

PLD# 707

THE STATE OF TEXAS

VS.

John Gaddes Lawrence W/M 9-2-83
DEFENDANT

00249 689

Homosexual Conduct

OFFICER: J. Quinn
AGENCY: HCSO
WK PHONE: 713-455-8050
DATE: 9-17-98

Complainant information:
794 Normandy #133

COMPLAINT
IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned Affiant, who, after being duly sworn, on oath deposes and says that he has reason to believe and does believe that John Gaddes Lawrence Defendant, on or about the 17th day of September, 1998, and before the filing of this complaint, in the County of Harris, and the State of Texas, in Justice Precinct 3, Position 1, did then and there intentionally and knowingly engage in deviate sexual intercourse, namely oral sex, with a member of the same sex (man).

Contrary to law and against the peace and dignity of the State.

J.L. Quinn #1999
AFFIANT

SWORN to and subscribed before me on 12 Sept 98

Notary Public, the State of Texas
Clerk of Court, Harris County

REPORTER: O. JONES
Notary Public, State of Texas
My Commission Expires
FEBRUARY 8, 2002

000033

TAB B

Please Print

Probable Cause Affidavit — Class "C" Instanter Charges

Lawrence John Geddes

WI 14 9-2-43 5'11" 150 Brn

S Y

794 Normandy #533

Houston Tx 77015 713-450-3609

249689

9-17-98 Quinn J 1999

HCSO 455-5050 794 Normandy #533 Homosexual Conduct

Officers dispatched to 794 Normandy #533 reference to a weapons disturbance. The reporter advised dispatch a black male was going crazy in the apartment and he was armed with a gun.

Officers met the reporter who directed officers to the vestiaire apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

Witness: W.D. Lilly
HCSO Unit 1994
[illegible]
Houston, Tx 77019 713-455-5050

794 Normandy #533 J.J. Quinn #1999

12 Cert. [illegible] 98

CAUSE NO. 98-48531

THE STATE OF TEXAS	§	IN THE COUNTY
	§	CRIMINAL COURT
	§	
VS.	§	AT LAW NUMBER FIVE (5)
	§	
TYRONE GARNER	§	HARRIS COUNTY, TEXAS

DEFENDANT'S MOTION TO QUASH COMPLAINT/INFORMATION UNDER TEXAS PENAL CODE §21.06

TO THE HONORABLE JUDGE OF THE COUNTY CRIMINAL COURT:

NOW COMES Tyrone Garner, defendant in the above-referenced cause, by and through his attorney of record, and files this motion to set aside and quash the complaint/information against him based on Texas Penal Code §21.06. As he argues below, the statute is unconstitutional on its face and as applied to him. First, it violates Mr. Garner's right to equal protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under the Equal Rights Amendment of Article 1, Section 3a and the equal rights provision of Article 1, Section 3 of the Texas Constitution. Second, §21.06 violates Mr. Garner's right to privacy guaranteed by the Bill of Rights and Fourteenth Amendment of the United States Constitution and by the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution. For the following reasons, the complaint/information against Mr. Garner should be quashed:

1. Defendant Garner was arrested and charged with violating Texas Penal Code §21.06, entitled the "Homosexual Conduct" statute.
2. Texas Penal Code §21.06, a class C misdemeanor, provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."
3. Texas Penal Code §21.01 defines "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."
4. Thus, neither use of force nor occurrence in a public place is an element of the "Homosexual Conduct" crime.
5. The complaint/information states that Mr. Garner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The complaint/information is attached hereto at Tab A.
6. The police report that forms the basis of the §21.06 charge states that Mr. Garner engaged in sexual relations with another man inside that man's home. Consistent with the elements of the crime under §21.06, the report contains no allegations of force or monetary exchange between Mr. Garner and the other man. The police report is attached hereto at Tab B.
7. The criminal charges against Mr. Garner under §21.06 rests solely on consensual, adult, private sexual relations with another person of the same sex.

Equal Protection and Equal Rights Amendment Violations

8. The "Homosexual Conduct" statute, Tex. Penal Code §21.06, classifies and criminalizes consensual sexual acts,

including those in private, according to the sex and sexual orientation of those who engage in them.

United States Constitutional Claim

9. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without an important or exceedingly persuasive purpose that is substantially or closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
10. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a legitimate or more substantial purpose that is rationally or more closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
11. In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court explained that governmental discrimination based on sex is impermissible unless the classification is "'substantially related'" to achieving an "exceedingly persuasive" justification. *Id.* at 533 (citation omitted). Here, no such justification exists for a law that criminalizes acts according to the sex of those who engage in them.
12. The United States Supreme Court emphasized in *Romer v. Evans*, 517 U.S. 620 (1996), that the Constitution "'neither knows nor tolerates classes among citizens.'" *Id.* at 623 (citation omitted). Section 21.06, like the amendment singling out and disadvantaging lesbians, gay men, and bisexuals that was invalidated in *Romer*, lacks a legitimate

purpose, much less a more substantial state interest, for its discriminatory classification against gay people.

Texas Constitutional Claims

13. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without the classification being narrowly tailored to serve a compelling government interest, Texas Penal Code §21.06 violates Article 1, Section 3a of the Texas Constitution, known as the Equal Rights Amendment, as well as Article 1, Section 3 of the Texas Constitution.
14. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a constitutionally sufficient justification for that classification, Texas Penal Code §21.06 violates Article 1, Sections 3 and 3a of the Texas Constitution.
15. As the Texas Supreme Court explained in *In re McLean*, 725 S.W.2d 696 (1987), the state can justify a sex-based classification under the Equal Rights Amendment to the Texas Constitution "only when . . . there is no other manner to protect" a compelling state interest. Id. at 698. No such need can be shown here.
16. Likewise, in *State v. Morales*, 826 S.W.2d 201, 204 (Tex. App.-Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Texas 1994), the court observed that "the State cannot make the same conduct criminal when done by one, and innocent when done by the other." No legitimate, much less more substantial state purpose, justifies the "Homosexual Conduct" law's punishment directed uniquely at gay Texans, such as Mr. Garner.

Right to Privacy Violations

17. The right to privacy guarantees individuals protection from state interference in personal, important decisions about their most intimate relationships and the ways in which they choose to express themselves through consensual sexuality. The freedom to make such decisions without state interference is particularly strong in one's own home and in other similarly private settings.

United States Constitutional Claims

18. Because it intrudes upon and imposes criminal sanctions on the private expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Garner's right to privacy under the Bill of Rights (including the First, Fourth, Fifth and Ninth Amendments) and the Fourteenth Amendment of the United States Constitution.
19. The United States Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld Georgia's sodomy statute against a privacy challenge, has been widely criticized by scholars and was wrongly decided. *See, e.g.*, Laurence H. Tribe, American Constitutional Law, 1422-1435 (2d ed. 1988). Indeed, the U.S. Supreme Court's "cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). And as noted below, the statute at issue in *Hardwick* has been struck down by the Georgia Supreme Court. When properly construed, the U.S. Constitution's right to privacy

protects the right of individuals, including Mr. Garner, to make deeply personal decisions about private sexual intimacy; §21.06 infringes that protection.

Texas Constitutional Claims

20. Because it intrudes upon and imposes criminal sanctions on the private consensual expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Garner's right to privacy under the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution.
21. As the Texas Court of Appeals explained in *State v. Morales*, 826 S.W.2d at 204, "we can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private." *See also Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) (recognizing right to privacy under Texas Constitution); *cf. Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (Texas Constitution can provide greater rights than U.S. Constitution). The *Morales* court then held that no compelling government interest justified that infringement of privacy rights. Similarly, the right to privacy here invalidates §21.06.

* * *

22. Appellate courts in other states have invalidated statutes similar to §21.06 as violating their state constitution's privacy and equal protection guarantees. In *Gryczan v. State*, 942 P.2d 112 (1997), the Montana Supreme Court struck down that state's statute criminalizing same-sex sexual relations, stating that "[t]he right of consenting

adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy." *Id.* at 125. *See also Powell v. State*, ___ S.W.2d ___, WL 804569 (Ga. Nov. 23, 1998) (holding Georgia's law invalid under state constitution's privacy guarantee); *Campbell v. Sundquist*, 926 S.W.2d 250, 162 (Tenn. Ct. App. 1996)(invalidating Tennessee's "Homosexual Conduct" law on privacy grounds). In *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993), the Kentucky Supreme Court struck down that state's law criminalizing same-sex sexual relations as violating the state constitution's equal protection and privacy guarantees.

23. Mr. Garner is prepared to offer further briefing on all of the above points, should that be of assistance to the Court.

WHEREFORE, PREMISES CONSIDERED, defendant prays that after notice and hearing, and consideration of his Motion to Quash, it be determined that Texas Penal Code §21.06 is unconstitutional on its face and as applied to him and that his Motion to set aside the complaint/information be granted.

RESPECTFULLY SUBMITTED,

WILLIAMS, BIRNBERG &
ANDERSEN, L.L.P.

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Proceedings pending)

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Telecopier: (713) 981-8670

TAB A

CASE NO. CR31C1000003

IN THE JUSTICE COURT OF
HARRIS COUNTY, TEXAS
PRECINCT 3, POSITION 1

60773957

THE STATE OF TEXAS

VS.

TYRON GARNER B/M 7-10-67
DEFENDANT

HAMAS EKUEL CONDUCT

OFFICER: J. QUINN
AGENCY: HCSO
WK PHONE: 713-455-5050
DATE: 9-17-99

Complainant information:
794 Normandy #833

COMPLAINT
IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned Affiant, who, after being duly sworn, on oath deposes and says that he has reason to believe and does believe that Tyron Garner, Defendant, on or about the 17th day of September, 1998 and before the filing of this complaint, in the County of Harris, and the State of Texas, in Justice Precinct 3, Position 1, did then and there intentionally and knowingly engage in deviate sexual intercourse, namely anal sex, with member of the same sex (man).

Contrary to law and against the peace and dignity of the State.

J. L. Quinn #1999
AFFIANT

SWORN to and subscribed before me on 12 Sept 99

Notary Public, the State of Texas
Clerk of Court, Harris County

KENNETH O. ADAMS
Notary Public, State of Texas
My Commission Expires
FEBRUARY 8, 2000

000032

TAB B

Please Print

Probable Cause Affidavit — Class "C" Instanter Charges

DEFENDANT NAME: GARNER TYRON

ALIAS NAME:

RACE: N SEX: M DOB: 7-10-67 HEIGHT: 5'9" WGT: 140 EYES: Brn

MARITAL STATUS: S U.S. CITIZEN: Y

STREET ADDRESS OF DEFENDANT: 6622 New York

CITY: Houston TX ZIP: 77021 PHONE NUMBER: 713-738-6398

OCCUPATION: unemployed HCSO SPIN: 773955

9-17-98 — DATE OF OFFENSE

QUINN, J.R. — OFFICER'S NAME

1999 — BADGE NUMBER

HCSO — AGENCY

455-8050 — WKS

794 Normandy — ARREST LOCATION

Homosexual Conduct — CHARGE

YOUR ACCOUNT OF WHAT HAPPENED (IN REGARDING TO CLASS "C" CHARGE FILED)

Officers dispatched to 794 Normandy #833 reference to a weapons disturbance. The reporter advised dispatch a black male was going crazy in the apartment and he was armed with a gun.

Officers met the reporter who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

Witness: W.D. Lilly
HCSO Unit 4344
11320 Wallisville
Houston, Tx 77044 713 455-8050

794 Normandy #833 — OFFENSE LOCATION

J.R. Quinn #1999 — AFFIANT'S SIGNATURE

SWORN TO AND SUBSCRIBED BEFORE ME ON 17 Sept 1998

[signature] — DEPUTY CLERK, JUSTICE OF THE PEACE

REHAFIEL G. ADAMS
Notary Public, State of Texas
My Commission Expires
FEBRUARY 3, 2000

000034

SUPREME COURT, U.S.
FILED
OCT 21 2002
OFFICE OF THE CLERK

No. 02-102

In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth District

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES A. ROSENTHAL, JR.
Harris County District Attorney

WILLIAM J. DELMORE III*
SCOTT A. DURFEE
Assistant District Attorneys
Harris County, Texas

1201 Franklin, Suite 600
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(713) 755-5826
**Counsel of Record*

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The petitioners were convicted in a Texas court of the misdemeanor offense of engaging in homosexual conduct, as defined by TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). Three questions for review are presented in their petition:

1. Whether their criminal prosecutions under section 21.06 of the Texas Penal Code violated the Fourteenth Amendment guarantee of equal protection of the law.

2. Whether their criminal prosecutions under section 21.06 of the Texas Penal Code violated their constitutional rights to liberty and privacy, as protected by the Due Process Clause of the Fourteenth Amendment.

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled.

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondent State of Texas hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

Harris County sheriff's deputies were told by a named informant that an armed man was "going crazy" in the apartment of petitioner John Lawrence. Pet. App. 129a. The investigating officers entered the apartment and observed petitioners Lawrence and Garner engaged in anal sexual intercourse. *Id.* The petitioners were each charged by complaint in a Harris County justice court with the commission of the Class C misdemeanor offense of engaging in homosexual conduct, an offense defined by TEX. PEN. CODE ANN. § 21.06(a) (Vernon 1994), as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[1] A Class C misdemeanor is punishable only by a fine not to exceed $500. TEX. PEN. CODE ANN. § 12.23 (Vernon 1994).

After the petitioners were convicted and fined in the justice court, they gave notice of appeal and the proceedings were transferred to Harris County Criminal Court at

[1] The term "deviate sexual intercourse" is defined in the Texas Penal Code as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01(1) (Vernon 1994).

Law No. 10.[2] After that court denied the petitioners' motions to quash the complaints on various constitutional grounds, they entered pleas of *nolo contendere* and were found guilty of the offense of engaging in homosexual conduct. Punishment was assessed in each case, pursuant to a plea bargain, at payment of a fine in the amount of $200.00, and the petitioners again gave notice of appeal from their convictions.[3]

A three-judge panel of the Court of Appeals for the Fourteenth District of Texas initially held that the petitioners' convictions violated the Equal Rights Amendment of the Texas Constitution,[4] with one justice dissenting. The respondent's motion for rehearing *en banc* was subsequently granted, and on March 15, 2001, the court of appeals issued a thorough and well-reasoned opinion *en banc*, in which all of the petitioners' constitutional challenges to the enforcement of section 21.06 were overruled, with two justices dissenting. *See Lawrence v. State*, 41 S.W.3d 349 (Tex. App.–Houston [14th Dist.] 2001, pet. ref'd); Pet. App. 4a, *et seq*. The holdings of the court of appeals may be briefly summarized as follows:

[2] An appeal from a judgment of conviction in a Texas justice court results in a trial de novo in a county court. TEX. CODE CRIM. PROC. ANN. art. 45.042 (Vernon Supp. 2002).

[3] A case which has been appealed from a Texas justice court to a county court may be further appealed to a court of appeals if the fine exceeds $100 or the sole issue is the constitutionality of the statute on which the conviction is based. TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 2002).

[4] TEX. CONST. art. I, § 3a.

1. Enforcement of the statute prohibiting homosexual conduct did not violate the respective Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 3, of the Texas Constitution, because the statute does not implicate fundamental rights or a suspect class, and it has a rational basis in the Legislature's determination that homosexual sodomy is immoral. The fact that heterosexual sodomy is no longer a criminal offense under Texas law is not constitutionally significant, since the Legislature could rationally distinguish between an act performed with a person of the same sex and a similar act performed with a person of different sex. *Lawrence*, 41 S.W.3d at 353-59; Pet. App. 13a-18a.

2. Enforcement of section 21.06 did not violate the Equal Rights Amendment of the Texas Constitution, because the statute applied equally to both men and women who engaged in the prohibited conduct, and it was not the product of prejudice towards persons of either gender. *Lawrence*, 41 S.W.3d at 357-59; Pet. App. 20a-24a.

3. The petitioners' prosecutions for the offense of engaging in homosexual conduct did not violate any constitutional right to privacy or fundamental liberty rights under the State or Federal Constitution, since, in light of the long history of imposition of criminal sanctions for such conduct, it could not be said that the State of Texas or the United States recognizes any "fundamental right" to engage in homosexual activity. *Lawrence*, 41 S.W.3d at 359-62; Pet. App. 25a-31a.

The petitioners attempted to persuade the Texas Court of Criminal Appeals to review the decision of the

Court of Appeals for the Fourteenth District, but their petition for discretionary review was refused, without written opinion, by that court on April 22, 2002 (Pet. App. 1a.)

ARGUMENT

I. Introduction.

The opinion issued by a Texas intermediate appellate court in this case broke no new ground. The court of appeals, sitting *en banc*, carefully reviewed this Court's precedents involving the constitutional right of privacy and the guarantee of equal protection of the laws, and it rendered a decision which is squarely consistent with the decisions of this Court, the federal courts of appeals and the state appellate courts which have construed and applied the federal constitutional provisions in question. There is no conflict for this Court to resolve, and there is no need for this Court's intervention in a debate which is ongoing in the various state legislatures, the deliberative bodies properly charged with the task of determining whether particular conduct is still regarded as immoral to the extent that it warrants the imposition of a penal sanction.

With regard to the constitutional right-to-privacy issue, the court below merely recognized that its decision was controlled by this Court's holding on precisely the same issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and there is no need for the Court to reconsider its decision in *Bowers* at this time. In light of the fact that homosexual anal sodomy was viewed as criminal behavior under state law and the common law for a period of

centuries, that conduct could not conceivably have achieved the status of a "fundamental right" in the brief period of sixteen years since *Bowers* was decided.

Second, while this Court has not previously addressed the precise issue of whether a "homosexual conduct" statute violates the Equal Protection Clause if heterosexuals are permitted to engage in similar acts of deviate sexual intercourse, the Court's prior decisions governed both the lower court's choice of the appropriate standard of review, and its ultimate resolution of the question of whether the legislative classification was constitutionally permissible. The holding of the Court of Appeals for the Fourteenth District followed, rather than deviated from, the holdings of this Court, and in the absence of any contrary holding from any appellate court construing the Equal Protection Clause of the United States Constitution, there is no need for this Court to review that holding at this time.

II. Constitutional Right to Privacy.

The Texas court of appeals correctly recognized that its disposition of the petitioners' constitutional privacy claim under the United States Constitution was directly controlled by this Court's decision in *Bowers*:

> Appellants do not specifically identify the constitutional provision which they claim creates a zone of privacy protecting consensual sexual behavior from state interference. However, we find there are but two provisions of the federal constitution which could arguably be construed to apply here – the Fourth and Ninth Amendments.

The Fourth Amendment is not applicable because appellants do not contest, and have never contested, the entry by police into the residence where they were discovered. Thus, we must assume the police conduct was both reasonable and lawful under the Fourth Amendment.

The Ninth Amendment also offers no support. In *Bowers v. Hardwick*, the defendants were convicted of violating the Georgia sodomy statute. 478 U.S. at 190-91, 106 S.Ct. 2841. Relying upon *Griswold v. Connecticut* [381 U.S. 479 (1965)] and other decisions recognizing "reproductive rights," the defendants argued that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity that encompasses homosexual sodomy. The court rejected the argument and said "the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Bowers*, 478 U.S. at 191, 106 S.Ct. 2841.... Because we find no constitutional "zone of privacy" shielding homosexual conduct from state interference, appellants' second point of error is overruled.

Lawrence, 41 S.W.3d at 360-62.

In its opinion in *Bowers*, this Court observed that it had recognized the existence of a constitutional right of privacy, permitting an individual to make certain personal decisions free from governmental interference, only in cases involving child-rearing and education, family relationships, procreation, marriage, and the "fundamental individual right to decide whether or not to beget or bear a child," *Bowers*, 478 U.S. at 190-91, and the Court noted the lack of any obvious connection between homosexual

sodomy and those prior decisions relating to family and childbearing. *Id.*

The Court noted in *Bowers* that it had previously singled out for heightened constitutional protection from governmental regulation only fundamental freedoms that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). In light of the fact that homosexual sodomy constituted a criminal offense under the common law and, until 1961, the statutes of every state in the Union, the Court found in *Bowers* that any suggestion that the right to engage in such conduct was a fundamental freedom "implicit in the concept of ordered liberty" was, "at best, facetious." *Bowers*, 431 U.S. at 191.

There is nothing in this Court's subsequent treatment of *Bowers* to suggest that it was wrongly decided or should be reconsidered. To the contrary, the methodology utilized by the Court in *Bowers* has been similarly employed in subsequent cases involving claims that personal liberties were protected by a constitutional right to substantive due process under the Fourteenth Amendment.

For instance, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court found that a biological father had no constitutional right to visitation with a child born while the child's mother was married to another man. As in *Bowers*, the Court's opinion explored whether the petitioner's asserted liberty interest was grounded in the "historic practices of our society," *id.* at 124, since the Court has recognized only fundamental rights which are "traditionally protected by our society," *i.e.*, "only those

protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'." *Id.* at 122 (quoting from *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.)). As in *Bowers*, the Court found in *Michael H.* that the legal tradition of our society was actually hostile to the position espoused by the petitioner, and determined that his asserted liberty interest could, therefore, not be deemed a fundamental right protected by the Fourteenth Amendment.

More recently, the same mode of analysis was utilized in *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the claimed fundamental right was physician-assisted suicide. In its determination of whether the case involved a liberty interest protected by the Fourteenth Amendment, the Court began, "as in all due process cases, by examining our Nation's history, legal traditions, and practices," *id.* at 710, in order to determine whether the asserted right was, "objectively, 'deeply rooted in this Nation's history and tradition'," and "implicit in the concept of ordered liberty." *Id.* at 720-21. As in *Bowers*, the Court found "a consistent and almost universal tradition that has long rejected the asserted right," *id.* at 723, and concluded that, therefore, there was no fundamental liberty interest protected by the Due Process Clause. *Id.* at 728.

It is apparent from *Glucksberg* that the historical analysis utilized in *Bowers* is fully consistent with the Court's current substantive due process jurisprudence, and that there is no point in rehashing the issue again raised in this case. Fundamental rights must be grounded in the nation's history and legal traditions, and as noted in *Bowers* and in the opinion of the court below, the states of the Union have traditionally punished homosexual conduct as a serious criminal offense. History has not

changed, and it is inconceivable that homosexual sodomy has suddenly achieved the status of a treasured constitutional right, deeply rooted in the nation's history and legal traditions, in the few years since *Bowers* was decided.

It is true that a small number of state courts have recently invalidated statutes prohibiting sodomy or homosexual conduct on state constitutional privacy grounds. Nothing in those courts' opinions suggest that this Court's Fourteenth Amendment analysis requires reconsideration, however, since their decisions are all predicated upon findings that their respective state Constitutions provide more privacy protection than the Federal Constitution.

In *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992), in which the Kentucky statute criminalizing homosexual conduct was invalidated, the Kentucky Supreme Court based its ruling upon the "textual and structural differences between the United States Bill of Rights and our own, which suggest a different conclusion from that reached by the United States Supreme Court is more appropriate." In *Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996), an intermediate appellate court invalidated a similar statute, noting that both the "Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution."

Similarly, in *Gryczan v. State*, 942 P.2d 112, 121-22 (Mont. 1997), in which enforcement of a statute prohibiting "deviate sexual conduct" was found to violate a state constitutional right to privacy, the Supreme Court of Montana noted that it had "long held that Montana's

Constitution affords citizens broader protection of their right to privacy than does the federal constitution." In *Powell v. State*, 510 S.E.2d 18, 22 (Ga. 1998), a general sodomy statute was invalidated upon a finding that the "right to be let alone guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U. S. Constitution . . . " Finally, in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), the Arkansas Supreme Court recently accepted the appellant's suggestion that "Arkansas's Constitution can be held to provide greater privacy rights than the United States Constitution," *id.* at 344, noting that, "Arkansas has a rich and compelling tradition of protecting individual privacy." *Id.* at 349-50.[5]

The fact that several state courts have found a more extensive right to privacy in their respective state constitutio: obviously has no significance with regard to this Cou: construction of the United States Constitution. Those dec s certainly do not conflict with the Texas court's - of protected liberty interests under the Federal Constitution in this case, and their reasoning does not suggest any need to reconsider the Court's prior approach to identifying those rights under the Fourteenth Amendment. If anything, the availability of state court

[5] It should not be inferred from this litany that *all* of the state courts are finding that their state constitutions protect private consensual acts of sodomy from criminal prosecution. For instance, the Louisiana Supreme Court recently held in *State v. Smith*, 766 So.2d 501 (La. 2000), that neither the Louisiana Constitution nor the Federal Constitution created any right of privacy or liberty interest which would preclude prosecution for consensual acts of heterosexual or homosexual sodomy, despite the inclusion in the Louisiana Constitution of a provision expressly guaranteeing a right to privacy.

relief based upon independent state constitutional grounds only diminishes the apparent need for federal intervention in an issue which is properly being resolved on a state-by-state basis.

III. Equal Protection.

The Court of Appeals for the Fourteenth District correctly held that because the petitioners' prosecutions did not implicate the exercise of fundamental rights or constitute discrimination against a suspect class of individuals, the statute under which the petitioners were prosecuted must be "presumed to be valid," and it must be "sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Lawrence*, 41 S.W.3d at 352 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). The court's choice of the appropriate standard for reviewing the legislative classification in question was entirely consistent with the relevant decisions of this Court and the federal courts of appeals, and the petitioners have identified no decisional conflict requiring the granting of a petition for writ of certiorari.

The court of appeals could not have erred in holding that section 21.06 does not impede the exercise of fundamental rights, for the reasons stated in the preceding section of this brief in opposition. As noted *supra*, in light of the long legal tradition of treating homosexual sodomy as a criminal offense, it cannot reasonably be suggested that engaging in homosexual anal intercourse is a vital fundamental right "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Bowers*, 478 U.S. at 194.

Also, the court of appeals could not have erred in holding that section 21.06 does not target a "suspect class" of individuals, for at least two reasons.

First, section 21.06 does not apply only to persons with a fixed homosexual orientation. It applies equally to bisexuals, and to heterosexuals who are tempted to engage in homosexual conduct because of confinement in prison, an interest in sexual experimentation or any other reason. The "statute is directed at certain conduct, not at a class of people," and it "affects only those who choose to act in the manner proscribed." *Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1984) (opinion on rehearing), *cert. denied*, 478 U.S. 1022 (1986). If Dr. Alfred C. Kinsey's estimates are accurate, as little as fifty percent of the population remains exclusively heterosexual, *see Lawrence*, 41 S.W.2d at 35 .. 6, which would mean that the statute may affect the c emplated conduct of more heterosexual or bisexual individua' an individuals who view themselves as exclusive' iosexual in orientation. Therefore, it is not at all clear that the statute "targets" any particular group for discriminatory treatment.[6]

Second, even if it is assumed that the statute represents a legislative classification involving sexual orientation, the use of the deferential "rational basis" standard of review would still be appropriate, since it is well established that individuals of homosexual orientation do not

[6] When a statute is not a product of purposeful discrimination, a mere disparate impact upon a class of citizens does not establish a violation of the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

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constitute a suspect class for the purpose of equal protection analysis.

The profusion of litigation involving the exclusion of homosexuals from military service has provided ample opportunity for consideration of whether homosexuals constitute a suspect class, and the federal courts of appeal appear to be so far unanimous in holding that classifications based upon homosexuality do not require any heightened scrutiny under the Equal Protection Clause.[7]

[7] *See, e.g., Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996) ("rational basis is . . . the suitable standard for review" of the military "don't ask/don't tell" policy; *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) ("the standard for review is whether section 21.06 [of the Texas Penal Code] is rationally related to a legitimate state end"); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (holding that city charter amendment pertaining to sexual orientati was subject to review "under the most common and least rigorous equal protection norm . . . the 'rational relationship' test"); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) ("deferential standard of review" held applicable to military regulation targeting homosexuals); *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997) (rejecting contention that homosexuality is "suspect classification" requiring heightened scrutiny).

See also Holmes v. California Army National Guard, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1998) ("because homosexuals do not constitute a suspect or quasi-suspect class," the military "don't ask/don't tell" policy is subject only "to rational basis review"); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) ("classification based on one's choice of sexual partners is not suspect"); *Steffan v. Perry*, 41 F.3d 677, 684, n. 3 (D.C. Cir. 1994) (holding that a group "defined by reference" to homosexual conduct "cannot constitute a suspect class"); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990)

(Continued on following page)

In addition, this Court itself utilized the most deferential standard of review – the rational basis test – in *Romer v. Evans*, 517 U.S. 620, 631-32 (1996), in which the Court found that a state constitutional provision which targeted homosexuals was unconstitutional under the Equal Protection Clause. The plaintiffs in *Romer v. Evans* had not even contested a determination by a lower court that homosexuals did not constitute a "suspect class." *Id.* at 640 n. 1 (Scalia, J. dissenting).

It thus appears, with regard to the issue of the appropriate standard for review, that there is no conflict for this Court to resolve, and that the Court of Appeals for the Fourteenth District could not have erred in utilizing the "rational basis" standard in reviewing the constitutionality of section 21.06.

Furthermore, that Court's ultimate holding – that the Texas Legislature had a rational basis for its determination that homosexual deviate sexual intercourse should be unlawful – is equally unassailable.

This Court held in *Bowers*, 478 U.S. at 196, that the Georgia statute which made sodomy a penal offense had a "rational basis," in that it implemented the belief of the majority of the Georgia electorate that "homosexual sodomy is immoral and unacceptable." Justice White, the author of the majority opinion, rejected the notion that laws may not be based upon perceptions of morality:

(holding that a homosexual "is not a member of a class to which heightened scrutiny must be afforded").

> The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Id. at 478 U.S. 196; *see also Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (noting the unlikelihood that "very many laws exist whose ultimate justification does not rest upon the society's morality," and upholding naval regulations excluding homosexuals from service as a permissible implementation of public morality).

Six years after *Bowers* was decided, a plurality of this Court held in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), that the goal of implementing public morality could meet even the higher standard of need required to justify the incidental restriction of freedom of expression which would result from enforcement of a public nudity ban in the context of nude dancing in nightclubs:

> This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637, 37 L.Ed.2d 446 (1973), we said:
>
> > "In deciding *Roth [v. United States*, 354 U.S. 476 [77 S.Ct. 1304, 1 L.Ed.2d 1498] (1957)],

this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' *Id.*, at 485 [77 S.Ct., at 1309]." (Emphasis omitted.)

And in *Bowers v. Hardwick*, 478 U.S. 186, 196, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986), we said:

> "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

It does not appear that any Court has ever rejected the proposition that the implementation and protection of public morality may constitute a rational basis for a statute which criminalizes illicit sexual behavior, in resolving a challenge to such a statute under the Equal Protection Clause of the Federal Constitution. To the contrary, the federal courts of appeals have repeatedly noted that the enforcement of public morality is an acceptable justification for legislative action. In fact, one year before *Bowers* was decided, the Court of Appeals for the Fifth Circuit upheld the very statute in issue in this case – section 21.06 of the Texas Penal Code – as an appropriate exercise of the Legislature's power and authority to regulate public morality:

> In view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that section 21.06 is "totally unrelated to the pursuit of," [*McDonald v. Board of Election Commissioners*, 394 U.S. 802,] at 809, 89 S.Ct. [1404] at 1408, 22 L.Ed.2d [739] at 745 [(1969)], implementing morality, a permissible state goal, *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984). Therefore, section 21.06 does not deprive Baker of equal protection of the laws.

Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3337 (1986). *See also Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir. 1998), *cert. denied*, 525 U.S. 1024 (1998) (noting that "[l]egislatures are permitted to legislate with regard to morality ... rather than confined to demonstrable harms," and that a "traditional purpose of criminal punishment is to express moral condemnation of the criminal's acts"); *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (holding that the protection of public morality was a constitutionally acceptable basis for an Alabama statute prohibiting sale of sexual devices, since the "crafting and safeguarding of public morality has long been an established part of the State's plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny").[8]

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[8] *Accord, Yorko v. State*, 690 S.W.2d 260, 266 (Tex. Crim. App. 1985) ("We hold that the rationale justifying the State's exercise of the police power against obscene expression – that is, the protection of the social interest in order and morality – also justifies the State in criminalizing the promotion of objects designed or marketed as useful primarily for the stimulation of human genital organs.").

The petitioners argue that it is illogical to continue to treat homosexual sodomy as an "immoral" criminal offense after the Texas Legislature repealed the state's general sodomy statute in 1974, but in light of the biological differences between the sexes, there is plainly a rational distinction to be made between heterosexual and homosexual conduct. Homosexual conduct cannot lead to biological reproduction, or occur within or lead to a marital relationship. The Texas electorate evidently continues to believe that *any* sexual conduct between persons of the same sex is more "immoral and unacceptable," *Bowers,* 478 U.S. at 196, than similar conduct occurring between persons of opposite sex, and that belief is consistent with the traditional and historical view that homosexual activity is *malum in se.* A legislative distinction between persons of the same sex engaging in an act and persons of diffe[illegible] sex engaging in the same act is simply not so strange or foreign as to be irrational.

Fina[illegible]e petitioners argue that this Court's decision in *Romer v. Evans,* 517 U.S. 620 (1996), supports their equal protection argument, but the Colorado constitutional provision in issue in *Romer* was entirely dissimilar to section 21.06, in at least two respects: the Colorado classification was based upon sexual *orientation*, rather than conduct; and the disadvantage imposed upon individuals with a homosexual orientation was undemocratic and irrational.

The constitutional amendment attacked in *Romer* would have absolutely barred any "legislative, executive, or judicial action at any level of state or local government designed to protect" the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 620. This Court held that

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the amendment lacked an adequate relationship with any legitimate state purpose because it was "at once too narrow and too broad," as it classified persons by a single trait – homosexual orientation – and then denied persons with that trait any legal protection or consideration whatsoever. *Id.* at 633. In other words, the Colorado amendment went beyond punishment of the act of engaging in deviate sexual intercourse, and tended to disenfranchise individuals because of their mere tendency or predilection to engage in such conduct.

Section 21.06 does not suffer from that flaw. It is the sexual conduct itself which is treated as immoral, and a statute which renders such conduct illegal is obviously related to the goal of discouraging the conduct and thereby implementing morality. A statute which, say, prohibited practicing homosexuals from attending public schools would not be rationally related to that permissible state goal, and would violate the Equal Protection Clause; but a statute imposing criminal liability upon only those persons who actually engage in homosexual conduct is perfectly tailored to implement the communal belief that the conduct is wrong and should be discouraged. Thus the plaintiffs in *Romer v. Evans* disavowed any intent to even argue that *Bowers v. Hardwick* should be overruled, *Romer*, 517 U.S. at 630-31 (Scalia, J., dissenting), and it has never been so much as suggested that *Romer* had the effect of overruling *Bowers.*

Because section 21.06 is narrowly tailored to implement the permissible legislative goal of discouraging individuals from engaging in homosexual deviate sexual intercourse, and it does not impose unrelated or irrational penalties upon persons of homosexual orientation, *Romer*

is inapposite and does not conflict with the decision of the Texas court of appeals in this case.

Since the holding of the court below on the equal protection issue was based upon well-established principles of constitutional law, and it does not conflict with other courts' construction of the Equal Protection Clause of the Fourteenth Amendment in similar or analogous cases, there is no need for this Court to review that holding.

IV. Summary.

Morality is a fluid concept, and public opinion regarding moral issues may change over time, but what has *not* changed is the understanding that government may require adherence to certain widely-accepted moral standards and sanction deviation from those standards, so long as it does not interfere with constitutionally protected liberties. The legislature exists so that laws can be repealed or modified to match prevailing views regarding what is right and wrong, and so that the citizens' elected representatives can fine-tune the severity of the penalties to be attached to wrongful conduct. Perhaps homosexual conduct is not now universally regarded with the same abhorrence it inspired at the time of the adoption of our Federal Constitution, but any lag in legislative response to a mere change of public opinion – if such a lag actually exists – cannot and must not constitute the basis for a finding that the legislature's original enactment exceeded its constitutional authority.

As stated in *Washington v. Glucksberg*, 521 U.S. at 735-36, there is "an earnest and profound debate about the morality, legality and practicality" of the statute in question; and the denial of the petition for writ of certiorari in

this case will "permit this debate to continue, as it should in a democratic society."

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

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Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

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The Court should not, as urged by Respondent, stay its hand and refuse even to consider whether the Texas legislature can constitutionally target same-sex couples and criminalize their expressions of sexual intimacy. Where, as here, a State exempts the majority from onerous regulation of its behavior while barring the same behavior for a disfavored group of citizens, a just political resolution is particularly unlikely and constitutional concerns are particularly acute. Moreover, Respondent's position ignores the ongoing, concrete harms caused by this law and others like it. Those harms burden not only Petitioners, who were convicted for their consensual sexual conduct in a private home, but also the many other gay men and lesbians who suffer the stamp of "criminal" and the wide-ranging discrimination that sodomy laws are used to justify. The Court should review the Texas statute and Petitioners' convictions under the federal Equal Protection Clause and the federal right of privacy.

I. Texas Ignores the Compelling Harms and Important Constitutional Questions That Strongly Warrant Review.

As the Brief in Opposition confirms, this case cleanly presents the issue of the constitutionality of Texas's "Homosexual Conduct" law, Section 21.06, which criminalizes consensual, adult sexual activity for same-sex couples only. Petitioners' federal constitutional challenges were pressed in the state courts, were adjudicated there on the merits, and are properly presented here. Br. in Opp. 1-4; Pet. 5-8. For compelling reasons, the Court should not bypass this opportunity to consider Petitioners' challenges on the merits.

The State does not even address the fact that laws like Section 21.06 impose grievous harms on all gay and lesbian citizens, which is itself sufficient reason for review. Here, Petitioners were arrested in a private home, jailed, prosecuted, and punished. They are convicted criminals merely for participating in activity that their heterosexual neighbors can engage in without penalty. But even in the absence of prosecution, Section 21.06 brands gay and lesbian Texans as

criminals. That is no mere abstract harm. Rather, the classification in this law is used to justify myriad additional forms of serious and concrete discrimination against lesbians and gay men in employment, parenting, and other facets of everyday life. *See* Pet. 13-16. Same-sex-only prohibitions in three other states have the same effects, and even the facially neutral sodomy laws of an additional nine states are frequently cited to justify adverse treatment of gay and lesbian citizens. *Id.* The Court should not close its eyes to the reality that these laws make lesbians and gay men second-class citizens, with wide-ranging repercussions.

Texas's plea for the Court to decline review, in favor of legislative debate, also fails to recognize that this case presents the very situation where the democratic process is least likely to correct itself. The democratic majority does not bear the burdens it has imposed on a disliked minority. Texas has long since repealed the law criminalizing "deviate sexual intercourse" as to heterosexual couples, but continues to impose criminal sanctions for such conduct only on homosexual couples. *See* Pet. 2-3. It is in this situation that federal judicial review is most necessary.

The State's position is also internally contradictory. Texas points to the fact that most States historically had criminal sodomy laws as a reason to deny review. Br. in Opp. 8. But it then argues that the wave of invalidations and repeals of consensual sodomy laws in many States – instead of supporting constitutional scrutiny – "only diminishes the apparent need for federal intervention in an issue which is properly being resolved on a state-by-state basis." *Id.* at 11. Under that reasoning, there is never an appropriate time for this Court to undertake federal constitutional review. Now is the right time, however, because a significant handful of States, including Texas, resist state judicial or legislative remedies for these discriminatory and invasive laws. Federal judicial review is the only remedy available in those States.

Only *this* Court can provide full federal review. The lower federal courts do not have appellate jurisdiction to review the constitutionality of state-court criminal convictions under laws like Section 21.06. Further, only this Court can revisit its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Review is warranted not only to reconsider *Bowers*'s actual privacy holding, but also and independently to end the improper use of that ruling in the equal protection context. Both the Brief in Opposition and the decision below illustrate this problem when they import *Bowers* and other holdings about *evenhanded* laws into consideration of Petitioners' equal protection claim. Br. in Opp. 14-17; Pet. App. 13a-18a. *Bowers* did not decide any equal protection question, *see* 478 U.S. at 196 n.8, yet it is still being read by state and lower federal courts, even after *Romer v. Evans*, as allowing *discriminatory* laws that are grounded solely on bare disapproval – the majority's moral condemnation – of gay people. Courts are misconstruing *Romer* as limited to its facts, rather than as an exposition of "conventional and venerable" principles, 517 U.S. 620, 635 (1996), and are continuing to sanction illegitimate discrimination against gay Americans. *See* Pet. 17 n.20.

This Court, contrary to Texas's arguments, should not be dissuaded from taking up its vital role in the elaboration of the meaning of federal constitutional rights. That role is critical here to remedy serious harms and to redress erroneous limitations on equal protection and the right of privacy.

II. Far from Being "Unassailable," the Equal Protection Ruling Below Conflicts with *Romer* and a Central Mandate of the Equal Protection Clause.

Texas and its courts have failed to adhere to a core tenet of federal equal protection, a tenet wholly ignored by the Brief in Opposition: one group of people may not be singled out for adverse legal treatment based on the bare disapproval of that group by the majority. *Romer*, 517 U.S. at 634-35; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-48 (1985);

United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). This Court has repeatedly admonished that government may not subject gay people or any other group to special limitations simply "to make them unequal to everyone else." *Romer*, 517 U.S. at 635. It is illegitimate for a state to enact distinctions justified only by "animus toward the class [that the distinction] affects." *Id.* at 632. Whether couched as morality, fear, political expediency, or bias, mere negative attitudes alone are not a legitimate basis under the Equal Protection Clause for punishing one group but not others for the same conduct. *See Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 446-48; *Moreno*, 413 U.S. at 534; *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[1]

There is a critical distinction, under the Equal Protection Clause, between evenhanded regulations of conduct for all and laws that impose their burdens only on a distinct subgroup. Absent a fundamental right, evenhanded prohibitions of certain behavior generally may be justified on the ground that the majority finds the behavior immoral. Of course, American law often embodies or relates to moral precepts. But under the guarantee of equal protection, a bare decision to treat one group more harshly – without any concrete public purpose or the invocation of other factors properly cognizable by government – is repugnant. *See Cleburne*, 473 U.S. at 448; *Moreno*, 413 U.S. at 534-35. Labeling disapproval of the group "moral" does not change the fact that the majority simply wants to establish a more onerous rule for that group than it is willing to live under itself. A moral desire to discriminate has never been upheld. If the moral views of a majority favoring

[1] Petitioners contend that Section 21.06 violates the Equal Protection Clause under any level of scrutiny. This Court has never ruled on whether classifications based on sexual orientation warrant more skeptical review, and that question need not be addressed here if, as in *Romer*, Section 21.06 fails rational basis review. However, the factors warranting heightened skepticism are present when the government employs a sexual orientation-based classification. Pet. 21-22.

discrimination sufficed to justify discriminatory laws, then any unequal rule treating a disfavored minority more harshly could be upheld as legitimate and rational – including the constitutional provision struck down in *Romer*.[2]

Nor can the State now rewrite this criminal law to make it one that evenly applies to all. In the same breath as Texas tries to argue that the "Homosexual Conduct" law does not target those with a gay (same-sex) sexual orientation, it admits that those who are "exclusively heterosexual" are not burdened by the law in any way. Br. in Opp. 12. That admission is just another way of saying that those who are not heterosexual, and thus are gay or bisexual, *are* targeted by the law. The State's argument is no more persuasive than the contention that a law that bans writing with the left hand is not targeted at left-handed persons.[3]

The State's fleeting attempts to recast its justification for the law as something other than the majority's condemnation also do not satisfy even the lowest level of equal protection scrutiny. First, arguing that the classification does what it is

[2] *See* Pet. App. 70a-71a (Anderson, J., dissenting) ("[E]qual protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. Indeed, the equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process. The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression.") (internal citations omitted).

[3] Respondent also obscures the nature of the classification struck down in *Romer*. *See* Br. in Opp. 18-19. Colorado Amendment 2 prohibited any state action "whereby homosexual, lesbian or bisexual orientation, *conduct, practices* or *relationships* . . . entitle[d] any person or class of persons to have . . . [any] claim of discrimination." *Romer*, 517 U.S. at 624. The references to homosexual conduct, practices and relationships created a scheme of discrimination along sexual orientation lines, just as the overt reference to orientation did. Likewise, Section 21.06's distinct prohibition on same-sex sexual activity, or "Homosexual Conduct," discriminates on the basis of sexual orientation.

written to do – punish only same-sex couples for their intimacy – does not justify it. Texas's statement that "a statute which renders such conduct illegal is obviously related to the goal of discouraging the conduct," Br. in Opp. 19, does nothing more than confirm that the legislature enacted the statute it intended to enact. This tautology offers no rationale for the discriminatory classification drawn, and is utterly non-responsive to the equal protection question. *See Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) ("[t]he Equal Protection Clause requires more of a state law than" affirmation and application of the rule it has established; it requires justification of "the nature of the class singled out").

Second, Texas's passing references to "biological reproduction" and "a marital relationship" bear no relation to and cannot possibly justify the challenged classification. Section 21.06 draws a classification that concerns "deviate sexual intercourse," including oral and anal sex, Tex. Pen. Code § 21.01(1). The law allows different-sex couples to choose those forms of intimacy but prohibits them for same-sex couples. But regardless of the composition of the couple, those acts cannot accomplish biological reproduction. Similarly, whether a couple is married, plans to marry, or could marry bears no relation to this classification and cannot justify it. Heterosexuals are as free to participate in oral or anal sex within an adulterous relationship, in a "one-night stand," or with a long-term unmarried partner, as they are within a marriage.[4]

To let Texas's approach to equal protection stand would be to gut the federal constitutional promise that no group will be

[4] Texas correctly steers clear of the "rationales" for Section 21.06 put forward by its *amicus* Pro Family Law Center, whose approach rests on the very group-based stereotypes and prejudices that equal protection condemns. The classification employed in Section 21.06 is wholly unrelated to diminishing HIV transmission or enhancing mental health. Any impact of the law is to harm, not help, true public health initiatives.

subjected to illegitimate and arbitrary discrimination. The Court should grant review on the first question presented to disentangle equal protection analysis from the language of *Bowers* and to remedy the widespread injuries imposed by same-sex-only consensual sodomy laws.

III. The Court Should Take This Opportunity to Reconsider Its Anomalous and Harmful Decision in *Bowers*.

The palpable invasion of privacy and liberty that occurred in this case highlights the need to revisit *Bowers*. Petitioners began an evening as private citizens secluded in Lawrence's home, and ended the evening being hauled off to jail for prosecution and conviction as criminals for their consensual sex. The government scrutinized Petitioners' most intimate behavior and publicly condemned them for it. Criminal laws that permit the government to exercise this extraordinary level of intrusion into and control over private sexuality between consenting adults confront gay men and lesbians in the four states with same-sex-only prohibitions, and heterosexuals as well in nine other states.

In sanctioning this intrusiveness, *Bowers* is out of step with Americans' firmly rooted and broadly shared expectations of personal privacy. Those expectations are reflected in the legislative repeals and state court invalidations of sodomy laws summarized in the Petition. Pet. 24 & n.26. All adults in 37 States – and all adult heterosexuals in Texas and the three other States with discriminatory consensual sodomy bans – can rightly take for granted that their decisions to engage in oral or anal sex are not subject to scrutiny by the police and punishment as crimes, but rather are matters reserved for their own judgment and autonomy. *Bowers* reflects a distorted application of the Court's privacy jurisprudence and a departure from more recent decisions reinforcing the sanctity of the home. That ruling contradicts the fundamental understanding of American citizens that the government has

no place in their bedrooms, intruding into the most intimate bonds and the most personal choices of couples.

There is no forum but this Court where Petitioners' federal right of privacy claim can be heard on the merits. The State offers no persuasive ground for the Court to refuse that hearing. As the Court has frequently noted, *stare decisis* is not an "inexorable command" – especially in constitutional cases – and does not prevent the Court from reconsidering earlier decisions that "are unworkable or badly reasoned." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996). There is no pretense here that rigid adherence to *stare decisis* is necessary to advance a reliance, public safety, or other important interest. At most, Texas claims a prerogative to express its disapproval of homosexuality through this punitive and intrusive law. But some matters should be "place[d] . . . beyond the reach of majorities and officials." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

Texas argues that *Bowers* was correctly decided based upon a historical tally of criminal laws. It urges that two recent decisions, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), support such a method of fundamental rights analysis. But in neither of those decisions did the Court focus exclusively on historical legal treatment of the claimed right, defined at the narrowest level. In *Glucksberg*, the Court was "confronted with a consistent and almost universal tradition that has long rejected the asserted right, *and continues explicitly to reject it today*." 521 U.S. at 723 (emphasis added); *see also id.* at 716, 728.[5] Similarly, even the

[5] Moreover, only four Justices fully endorsed the lead opinion's approach in *Glucksberg*. Although Justice O'Connor joined the lead opinion, she wrote separately to express reservations that the lead opinion's approach could prove inadequate to analyze the claimed fundamental right under somewhat different facts. *See id.* at 736-38 (O'Connor, J., concurring); *see also id.* at 738-52 (Stevens, J., concurring in judgment); *id.* at 752-89 (Souter, J., concurring in judgment); *id.* at 789 (Ginsburg, J., concurring in judgment); *id.* at 789-92 (Breyer, J., concurring in judgment). The lead opinion in *Glucksberg* also considered at length the extremely weighty interests justifying laws against doctor-assisted suicide. *Id.* at 728-35.

plurality opinion in *Michael H.*, relied upon by Texas, gave weight not only to the historical denial of the parental right at issue, but also examined whether the law recognized such a right "in modern times." 491 U.S. at 125; *id.* at 127 ("[w]e are not aware of a single case, old or new, that has done so"); *see also id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (rejecting "imposition of a single mode of historical analysis" in defining liberty interests protected by the Due Process Clause). Finally, Respondent simply ignores *Casey*, a landmark post-*Bowers* decision in which the Court firmly rejected the view that laws in effect when the Fourteenth Amendment was ratified can categorically preclude recognition of a right as fundamental. *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 847 (1992) ("such a view would be inconsistent with our law").

In contrast to the unanimous and unbroken legal traditions found by the Court in *Glucksberg* and *Michael H.*, laws criminalizing private sexual intimacy between consenting adults have been overwhelmingly *rejected* in modern times. Almost three-quarters of the States have repealed or invalidated their sodomy laws. Pet. 23-24. And very few laws, historical or modern, *ever* targeted only same-sex couples, as Texas does. *Id.* at 3-4 & n.2. The contemporary process of repeal and invalidation of such laws, which has continued apace since *Bowers*, reflects an understanding that this is an area in which government may not tread without a compelling reason. *Id.* at 24-25. Accordingly, recent state high court decisions have rejected *Bowers*'s conclusion that no fundamental right is at issue. *See id.*[6]

[6] Because only this Court can overrule *Bowers*, the state courts have of necessity found that the fundamental right to privacy protects citizens from the intrusion of consensual sodomy laws only under their respective state

The contemporary rejection of these intrusive laws also reflects an increasingly robust and accurate understanding of gay and lesbian people and the meaningful adult relationships they enter into as same-sex couples – loving relationships in which sexual intimacy plays the same very important role as it does for heterosexual couples. Indeed, under most consensual sodomy laws, the right of privacy is at stake for *all* couples. To give that right proper respect, *Bowers*'s narrow, erroneous focus on "homosexual sodomy" for purposes of assessing the fundamental interests at issue requires fresh consideration here.

Contrary to the straw man erected by Respondent, Petitioners are not contending that developments since *Bowers* have created a fundamental right where none existed 16 years ago. Rather, the greater knowledge and the legal developments since *Bowers* indicate that *Bowers* itself was wrongly decided. Petitioners, after a gross invasion of their human dignity, have persevered up through all levels of the state courts in arguing that their convictions under Section 21.06 are incompatible with federal fundamental rights. In this stark case of criminal convictions for intimate conduct in the home, the Court should reconsider *Bowers*.

CONCLUSION

The petition for writ of certiorari should be granted.

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constitutions, not under the federal Constitution. Texas suggests that there is a difference in scope between federal and state constitutional protections that somehow counsels against reconsideration of *Bowers*. Br. in Opp. 9-11. In reality, however, States have been unwilling to follow the reasoning of *Bowers* because it is inconsistent with longstanding state legal traditions – traditions *Bowers* purported to respect. This widespread rejection of the underpinnings of *Bowers* only further demonstrates the need to reconsider that decision.

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On Petition for a Writ of Certiorari to the United States Court of Appeals of Texas Fourteenth District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, PRO FAMILY LAW CENTER, IN SUPPORT OF DENYING REVIEW

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v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals of Texas Fourteenth District

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* OF PRO FAMILY LAW CENTER, IN SUPPORT OF DENYING REVIEW

This motion is made pursuant to Supreme Court Rule 37.2. Permission from the other parties has not been granted for the filing of this *amicus* brief.

Filing of this brief will be helpful to the court as *Amicus Curiae* is familiar with the issues in this case.

Amicus Curiae, Pro-Family Law Center (PFLC), is a division of Abiding Truth Ministries, a non-profit corporation organized under the laws of the state of California. PFLC is dedicated to protecting marriage and the natural family and opposing the legitimization of homosexuality and related conduct in American society. It has been active in formulating and analyzing public policy related to homosexuality and in public advocacy of family values since its founding in 1999.

PFLC director, Scott Douglas Lively, is an attorney licensed to practice law in the State of California and an

internationally recognized expert on the topic of homosexuality in society. On behalf of PFLC, Mr. Lively has served as an advisor and consultant to family values activists and organizations globally, and has addressed conferences on these issues in the United States, Canada, Great Britain and East Africa.

PFLC's extensive involvement in the public discussion of homosexuality and related conduct enable it to provide this Court with an important perspective. In this brief, PFLC addresses the Equal Protection challenge to the Texas Homosexual Conduct Law and the rational basis for treating same-sex and opposite-sex sodomy differently under the law. PFLC urges the Court to deny Petitioner's Writ of Certiorari to overturn the Homosexual Conduct Law.

Moreover, both attorneys from the *UNITED STATES JUSTICE FOUNDATION* have served as a legal experts to the State of California's Legislature (hearings on civil unions). Counsel of Record has served as an expert to the Marriage Law Project of the Catholic University of America on same-sex relations and their impact on recognized institutions in American culture.

There are only a limited number of law firms who regularly address homosexual issues and legislation on a regular basis. *Amicus Curiae* and its Counsel of Record both do so and offer this brief to assist the Court.

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August 16, 2002

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IN THE

Supreme Court of the United States

No. 02-102

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals of Texas Fourteenth District

BRIEF OF *AMICUS CURIAE*, PRO FAMILY LAW CENTER, IN SUPPORT OF DENYING REVIEW

INTERESTS OF *AMICUS CURIAE*

The Pro-Family Law Center (PFLC) is a division of Abiding Truth Ministries, a non-profit corporation organized under the laws of the state of California. PFLC is dedicated to protecting marriage and the natural family and opposing the legitimization of homosexuality and related conduct in American society. It has been active in formulating and analyzing public policy related to homosexuality and in public advocacy of family values since its founding in 1999. PFLC director, Scott Douglas Lively, is an attorney licensed to practice law in the State of California and an internationally recognized expert on the topic of homosexuality in

society. On behalf of PFLC, Mr. Lively has served as an advisor and consultant to family values activists and organizations globally, and has addressed conferences on these issues in the United States, Canada, Great Britain and East Africa.

PFLC's extensive involvement in the public discussion of homosexuality and related conduct enable it to provide this Court with an important perspective. In this brief, PFLC addresses the Equal Protection challenge to the Texas Homosexual Conduct Law and the rational basis for treating same-sex and opposite-sex sodomy differently under the law. PFLC urges the Court to deny Petitioner's Writ of Certiorari to overturn the Homosexual Conduct Law.

INTRODUCTION

Review must be denied in this case. There is no constitutional right for an individual to engage in oral or anal sodomy with any person. This type of conduct is simply not implicit in any concept of ordered liberty such that a violation of substantive Due Process principles can be found. It is also not irrational discrimination to criminalize same-sex sodomy while allowing opposite-sex sodomy to remain legal. The greater public health consequences of same-sex sodomy provide a rational basis for discrimination against such conduct. Finally, *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 (1986) is good and necessary law to preserve the right of states to regulate conduct which can result in disease and death.

I. PETITIONERS' EQUAL PROTECTION ARGUMENT IS FAULTY

Petitioners claim that Texas law is discriminatory against homosexuals as a classification of persons. This position is not legally sound and should be rejected. To wit, Petitioners are claiming that homosexuals are unlawfully treated

differently than 'traditional' couples under the law. This could be a completely true statement and there would be no constitutional offense.

The core purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642, 113 S.Ct. 2816 (1993). It was not intended "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 3, 5 S.Ct. 357 (1884). In fact, it has been recognized that a State can rarely legislate without discriminating against one group or another. *Sullivan v. U.I.L.*, 616 S.W.2d 170, 172 (Tex. 1981). By definition, the prohibition of one form of conduct over another results in discrimination against those who may or may not participate in the conduct so legislated.

The Court has at no time recognized homosexuals or other participants in sexually-defined conduct as protected classes for Equal Protection purposes. In *Board of Education of Oklahoma City v. National Gay Task Force*, 729 F.2d 1270, 1273, aff'd. 470 U.S. 903 (1985), the court affirmed the ruling of the 10th Circuit Court on this point, saying "We cannot find that a classification based upon the choice of sexual partners is suspect." It has also addressed the issue in the negative by denying review of lower decisions finding no such protection, *see*, *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984), *rehearing denied* 470 U.S. 1009 (1985). A denial of review is no less appropriate in this case. There is no confusion in the laws as suggested by Petitioners. (Petitioners' Brief at p. 9).

Petitioners are attempting to force this country to condone homosexual relationships and to create a universal right, based on these relationships, which has never been recognized in the Constitutional history of the United States. *See*, *Jantz v. Muci*, 976 F.2d 623 at 624 (10th Cir. 1992), *cert.*

den., 508 U.S. 952 (1993) (re discrimination against job applicants and declaring no precedent to support protected class).

As noted in Justice Burger's concurring opinion in *Bowers v. Hardwick*, *supra.*, "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization [cites] . . . This is essentially not a question of personal "preferences" but rather of the legislative authority of the State." *Id.* at 196, 197.

II. HOMOSEXUALS ARE NOT A DISADVANTAGED CLASS FOR PURPOSES OF EQUAL PROTECTION ANALYSIS

Petitioners argue that many lesbians, gays, and bisexuals have suffered longstanding social and economic discrimination. These groups of persons are portrayed as disadvantaged groups. This is misleading and contrary to established law.

To establish a suspect/disadvantaged class, for purposes of the law, it must be shown that the plaintiff is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278 (1973). Moreover, the "immutability" of the plaintiff's characteristics is a factor to be considered. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764 (1973).

To date, this Honorable Court has recognized five separate classes as qualifying for strict scrutiny review in the face of discriminatory actions by a state. Homosexuality is not one of these classes. Indeed, "The Supreme Court, however, has never held that homosexuals are a suspect class. Likewise,

lower courts have also refused to classify homosexuals as a suspect class. Therefore, courts have not used a suspect class analysis to apply strict scrutiny to procedural burdens on homosexual rights legislation." Seth Hilton, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?* 28 U.C. DAVIS L. REV. 445, 453 (1995).

In fact, "The Supreme Court has identified several factors for determining whether a particular class of people constitute a suspect class. Class members must have an immutable characteristic, be politically powerless, and have suffered from a history of discrimination. Homosexuality usually fails this test by failing to establish an immutable characteristic.

When analyzing immutability, most have considered homosexuality strictly an issue of conduct that does not involve any irrepressible internal identification and understandings of self. In addition to the inability to clear the immutability hurdle, homosexuals have also experienced difficulty satisfying the politically powerless prong of the suspect class test. As a result of these problems, the Supreme Court has refused to declare homosexuals a suspect class." Gary Alan Colis, *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. L. REV. 991, 995 (1997) [citing Hilton, *Id.*]. See also, *Gay Inmates of Shelby County Jail v. Barksdale*, No. 84-5666 (6th Cir. June 1, 1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984); *State v. Walsh*, 713 S.W.2d 508, 511, 55 USLW 2070 (Mo. 1986); *In re Opinion of the Justices*, 129 N.H. 290, 295, 530 A.2d 21, 24 (1987); *Gay and Lesbian Students Ass'n v. Gohn*, 656 F.Supp. 1045, 1057 (W.D. Ark. 1987).

In applying the above critical analyses, the recognized "suspect" classes are: "Race," *Loving v. Virginia*, 388 U.S. 1, 11, 875 S.Ct. 1817 (1967), "Alienage," *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848 (1971), and,

"National Origin," *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193 (1944). The recognized quasi-suspect classes are: "Gender," *Frontiero, supra*, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724, 102 S.Ct. 3331 (1982), and, "Illegitimate Children," *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518 (1978).[1] There is a general policy against extending the protections of a 'suspect class status' to other groups. *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996); *High Tech Gays*, 895 F.2d at 571-72 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U. S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U. S. 1035 (1986).

There is a remarkable factual consistency in the above classes. Each class recognized possesses characteristics that are indeed "immutable" or virtually permanent. Simply, a person does not need to "come out of the closet" to have it known that he or she is a member of some suspect class. A mere inquiry into the person's birth circumstances reveals the person's membership status.

One's race, national origin, sex, alienage, and illegitimate status are all based on biological or identifiable geographical factors beyond the control of the class member. Once the member has taken on one of these statuses through birth, the status cannot be changed. However, the only way that one can be identified as a homosexual is through voluntary verbal or physical conduct which alerts another person to one's sexual status. Simply, a homosexual must somehow, fail to keep his or her status, or relationships flowing therefrom, private. The individual must breach his or her own "right of privacy." Homosexuals are not involuntarily disadvantaged for Equal Protection purposes.

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[1] See also, http://www.family.org/cforum/research/papers/a0002964. html

While Petitioners argue that the ban on same-sex sodomy is a form of gender discrimination, this argument has been expressly rejected time and again. The laws against gender discrimination arise exclusively out of the fact that women were treated as being inferior to men. The oppression caused by this 'labeling' gave rise to a need to enact protective laws. *Reed v. Reed* 404 U.S. 71, 92 S.Ct. 251 (1971); *Phillips v. Marietta Corp.* 400 U.S. 542, 91 S.Ct. 496 (1971).

Finally, as to whether homosexuals are "politically powerless," the Ninth Circuit Court in *High Tech Gays* correctly pronounced that "homosexuals are not without political power, they have the ability to and do 'attract the attention of lawmakers'." *Supra* at 895 F.2d at 574.

III. REGULATING SAME-SEX AND OPPOSITE-SEX CONDUCT DIFFERENTLY IS PERMISSIBLE DUE TO GREATER PUBLIC HEALTH RISK OF SAME-SEX CONDUCT

Petitioners assert that "As a matter of equal protection, bare condemnation of one group of people—whether termed a moral judgment, a value judgment, or simple dislike—cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny." [Petitioners' Brief at p. 9]. This is a strawman argument.

The law in question can be justified without the least reliance on religious morality or social prejudice against self-identified homosexuals. What is condemned by the law is not a "group of people" but volitional same-sex sodomy by individuals. Public health records identify such conduct as disproportionally costly to society as opposed to sodomy committed by opposite-sex partners. This is not to suggest that opposite-sex sodomy does not harm the public health, but the type and degree of harm are different enough that criminalizing one and not the other does not violate the very

lenient standards for classifications set by the court. The standards have been summarized as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344 (1957), citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337 (1911).

In *Romer v Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620 (1996), the court ruled that "If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."

A legitimate end not addressed by the majority in the Court of Appeals is the state's interest in public health, as distinct from public morals. The states' legitimate interest in the public health has been repeatedly affirmed by this court.

> "It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of congressional power or of private rights secured by the Constitution of the United States, the action of the states in this respect is beyond question in the courts of the nation." *L'Hote v. New Orleans*, 177 U.S. 587, 20 S.Ct. 788 (1900). *See also Barbier v. Connolly*, *supra* at 31.

Indeed, the state interest in public health is deemed so compelling that this court has ruled that a viable unborn child may be killed to preserve the health of a mother at her option, *Roe v. Wade*, 410 U.S. 113, 164-165, 93 S.Ct. 705 (1973), even at the point of birth, *Stenberg v Carhart*, (99-830) affirming 192 F.3d 1142 (2000).

Relative to the instant circumstances, studies indicate a significantly greater threat to public health from same-sex than from opposite-sex relationships, especially regarding AIDS. According to the most recent statistics compiled by the Centers for Disease Control, same-sex relationships account for 361,867 of the 793,026 total cases of AIDS reported in the United States as of June, 2001, while homosexual intravenous drug users accounted for another 50,066 cases. This is compared to 85,738 cases caused by opposite-sex relations.[2] An alarming recent increase in drug resistance to AIDS, or AIDS "super-infection," is also highest among homosexuals.[3]

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[2] CDC website http://www.cdc.gov/hiv/stats.htm#exposure

[3] *Antiretroviral-Drug Resistance among Patients Recently Infected with HIV*, New England Journal of Medicine, Volume 347:385-394, August 8, 2002. Susan J. Little, M.D., Sarah Holte, Ph.D., Jean-Pierre Routy, M.D., Eric S. Daar, M.D., Marty Markowitz, M.D., Ann C. Collier, M.D., Richard A. Koup, M.D., John W. Mellors, M.D., Elizabeth

The magnitude of the disparity between same-sex and opposite-sex conduct cannot be overlooked. According to the widely respected 1994 University of Chicago study "Sex in America: A Definitive Survey," only 5% of men and 4% of women have engaged in same-sex conduct at any time in their lives, with just 2.8% of men and 1.5% of women choosing homosexual relations exclusively.[4] There is thus a dramatically disproportionate public health risk associated with same-sex conduct as opposed to opposite-sex conduct.

Oxford University's International Journal of Epidemiology reported a dramatic impact on the average age of mortality for those involved in same-sex relationships.

> "In a major Canadian centre, life expectancy at age 20 years for gay and bisexual men is 8 to 20 years less than for all men. If the same pattern of mortality were to continue, we estimate that nearly half of gay and bisexual men currently aged 20 would not reach their 65th birthday. Under even the most liberal assumptions, gay and bisexual men in this urban centre are

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Connick, M.D., Brian Conway, M.D., Michael Kilby, M.D., Lei Wang, Ph.D., Jeannette M. Whitcomb, Ph.D., Nicholas S. Hellmann, M.D., and Douglas D. Richman, M.D.

[4] R. Michael, J. Gagnon, E. Laumann, *Sex in America: A Definitive Survey* (Boston: Little, Brown and Company, 1994), pp. 175-177; Tom W. Smith, "*American Sexual Behavior: Trends, Socio-Demographic Differences, and Risk Behavior*," National Opinion Research Center, GSS Topical Report No. 25, December 1998, p. 50. See also Dawson, D. A., "*AIDS Knowledge and Attitudes*," [various dates] Advance Data, *National Center for Health Statistics:* DHHS Pub. No. (PHS) 88-1_250, nos. 160, 161, 163, 176, 183, 193 reporting on a Federal government study considered to be the largest continuing survey of homosexual activity ever conducted, reaching 119,347 randomly selected adults by March of 1991. This study revealed that only 3% of males had reported any homosexual activity since 1977.

> now experiencing a life expectancy similar to that experienced by all men in Canada in the year 1871." [5]

Numerous diseases other than AIDS disproportionately affect same-sex partners.. Unlike AIDS, such diseases are prevalent in female same-sex relationships as well. The Medical Institute for Sexual Health reported that "Homosexual men are at significantly increased risk of HIV/AIDS, heaptitis, anal cancer, gonorrhea and gastrointestinal infections as a result of their sexual practices. Women who have had sex with women are at significantly increased risk of bacterial vaginosis, breast cancer and ovarian cancer than are heterosexual women." [6]

Neither are same-sex health risks limited to physical problems; they include mental health problems as well. In 2001, the Journal of the American Medical Association reported that:

Compared to other men, males who engage in same-sex conduct are:

> 727 percent more likely to have suffered bipolar disorders at some point in their lives, and 502 percent more likely in the last twelve months.
>
> 718 percent more likely to have suffered obsessive-compulsive disorder in the last twelve months, and 620 percent more likely at some point in their lives.
>
> 632 percent more likely to have suffered agoraphobia (fear of leaving home or being in public) in the last twelve months, and 454 percent more likely at some point in their lives.

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[5] Hogg, R.S., et al., *Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men*, International Journal of Epidemiology, Vol. 26, 657-661, 1997.

[6] Medical Institute for Sexual Health, "Executive Summary: Health Implications Associated with Homosexuality," 1999.

421 percent more likely to have suffered panic disorder, and 229 percent more likely to have suffered social phobia at some point in their lives.

375 percent more likely to have suffered simple phobia in the last twelve months, and 361 percent more likely at some point in their lives.

311 percent more likely to have suffered mood disorders at some point in their lives, and 293 percent more likely in the last twelve months.

261 percent more likely to have suffered anxiety disorders in the last twelve months, and 267 percent more likely over the course of their lifetimes.

270 percent more likely to have suffered two or more psychiatric disorders during their lifetime.

235 percent more likely to have suffered major depression at some point in their lives.

Compared to other women, females who engage in same-sex conduct are:

405 percent more likely to have suffered a substance use disorder.

241 percent more likely to have suffered mood disorders during their lifetimes.

209 percent more likely to have suffered two or more mental disorders during their lifetimes.[7]

While it cannot be stated conclusively that increased incidents of mental health and other disorders among persons involved in same-sex relationships are directly related to the

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[7] Sandfort, Theo G.M, et. al., *"Same-Sex Sexual Behavior and Psychiatric Disorders,"* Archives of General Psychiatry (Journal of the American Medical Association), Vol. 58, No. 1, (2001), cited in "The Legal Liability Associated with Homosexuality Education in Public Schools," Citizens for Community Values, Cincinnati, Ohio (2002).

practice of sodomy, such a conclusion by a state is legally permissible. It is well established that a state has broad latitude to interpret empirical data as to the secondary effects of regulated conduct. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 4, 106 S.Ct. 925 (1986), *Paris Adult Theatre I v. Slaton* , 413 U.S. 49, 93 S.Ct. 2628 (1973).

Thus, it is no constitutional violation for the State of Texas to discriminate against same-sex sodomy.

IV. RECENT SOCIAL TRENDS ARE NOT A SUFFICIENT BASIS FOR OVERRULING *BOWERS V. HARDWICK*

Petitioners argue that *Bowers v. Hardwick* should be overturned on the grounds that "legal and social developments have undercut its reasoning and its ultimate determination that the right to privacy does not shelter the deeply personal realm of consensual, adult sexual intimacy in the home." [Petitioners' Brief at p. 9].

While it is true that several states have repealed their sodomy laws in the years since Bowers, this fact does not justify interference with the remainder of states which have retained such laws. This court only recently affirmed its "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746 (2000) and has recognized that "states possess primary authority for defining and enforcing criminal law" *U.S. v Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995). Texas would have the right to criminalize sodomy even if it were the only state to do so.

Petitioners appeal to emotionalism, which makes up the bulk of their complaint, is equally unavailing. Euphemistic characterizations of anal sodomy as "loving behavior" [Petitioners' Brief at p.8] and "nurturing . . . intimacy "[p.13]

cannot mask the harmful nature of such conduct. Neither can such an appeal substitute for sound logic. To the extent that Petitioners implicitly suggest that their behavior is 'genetic' or 'involuntary,' they deny their own free will and responsibility for dangerous behavior with secondary effects. Mere sexual desire, no matter how compelling, cannot justify all sexual behavior. Plainly, it is the social consequences of the behavior in question, not the "sexual orientation" of the participants, that makes sodomy properly subject to criminal sanction in the public interest.

Petitioners' disregard for social consequences, however, extends beyond their own conduct. In one blow, Petitioners would virtually eliminate the ability of states to protect their citizens from destructive sexual behavior, for, as stated in *Bowers*: if the basis for finding a right to privacy for homosexual conduct is "voluntary sexual conduct between consenting adults, it would be difficult, except by fiat...to limit...adultery, incest and other sexual crimes" *Bowers v. Hardwick*, *supra* at 195-196.

CONCLUSION

Petitioners have failed to state a valid Equal Protection or Due Process claim and have not shown a legal basis for overturning Bowers. Accordingly, Petitioners request for review should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

—v.—

TEXAS,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) and its state affiliates are a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has appeared before this Court in numerous cases involving the proper interpretation of the Constitution as it applies to criminal laws, including as direct counsel for respondent in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The ACLU has advocated for interpretations of the Constitution that prevent the criminality of conduct from turning on the identity of the actor and that recognize a sphere of privacy sheltered from intrusion by the state. The proper application of the Constitution to the criminal law at issue in this case is a matter of significant concern to the ACLU and its members throughout the country.

STATEMENT OF THE CASE

Responding to a false report of a weapons disturbance, police entered John Lawrence's home and found Lawrence and Tyron Garner being sexually intimate. The police arrested them for violating Texas Penal Code § 21.06, which criminalizes "deviate sexual intercourse" (defined to include oral or anal sex) for a same-sex couple but not for an opposite-sex couple. After the trial court denied motions to quash the charges on federal and state equal protection and privacy grounds, Lawrence and Garner pled no contest. The court found both men guilty. Petition for *Certiorari* at App. 86a-141a, *Lawrence v. Texas*, No. 02-102 (filed July 16, 2002).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The Texas Court of Appeals affirmed the convictions and the Texas Court of Criminal Appeals denied review. *Id.* at 1a-4a.

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* in this case because the challenged law, and others like it, make a mockery of the constitutional promise of equal protection: a promise that the States will not "singl[e] out a certain class of citizens for disfavored legal status . . . ." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Texas violates the Equal Protection Clause of the Fourteenth Amendment by making "deviate sexual intercourse" a legal act for heterosexuals but a criminal one for lesbians and gay men. Section 21.06 makes certain sexual intimacies a crime for same-sex partners. Opposite-sex partners, however, may engage in the *identical* physical acts without risking criminal prosecution.[2] Such a classification is antithetical to the core concept of equal protection.

The Court should also grant review in this case because the constitutionality of sodomy laws is a question of compelling importance in light of the devastating ways such laws affect lesbians and gay men. Besides the obvious effect of criminal convictions and penalties for gay people, laws such as § 21.06 are used to distort current political debates ranging from whether discrimination based on sexual orientation should be legal to whether a municipality should offer health benefits to the domestic partners of its employees. Sodomy laws are also used to brand gay people as criminal and, as a result, to separate them from their children and to deny them jobs. The fact that laws like § 21.06 have such far-reaching effects renders their constitutionality a question of substantial importance that the Court should decide.

Finally, the Court should grant review in this case to reconsider its ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which fundamentally distorted the Court's privacy jurisprudence. Although not addressed separately here, *amicus* fully supports the due process arguments presented by petitioners. *See* Petition for *Certiorari* at 22-30, *Lawrence v. Texas*, No. 02-102 (filed July 16, 2002).

I. Making the Criminality of Conduct Depend on the Sexual Orientation of the Actor Is Anathema to Equal Protection

Making the criminality of an act turn on any aspect of the actor's identity—whether race, alienage, sex, or sexual orientation—violates a basic principle of equal protection. Texas's refusal to recognize this fundamental tenet merits review by the Court. *See McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (holding that adherence to equal protection principles is particularly important in the context of a criminal law, "where the power of the State weighs most heavily upon the individual or the group").

Governments have a sorry history of attempting to use the criminal law against disfavored groups by penalizing who people are, rather than what they do. In earlier periods of our history, it was a crime to marry if you did so outside of your race, to practice certain professions if you were a woman, to own land if you were an alien, or to receive government benefits if you were a "hippie." Again and again, courts have intervened and struck down these laws, recognizing that there can be no more fundamental violation of equal protection than to make the criminality of one's conduct depend on one's identity.

[2] Although Texas Penal Code § 21.01 defines "deviate sexual intercourse" in neutral terms, "deviate sexual intercourse" between consenting adults, not for pay, is a crime only when the defendant engages in the specified conduct "with an individual of the same sex." *See id.* § 21.06.

The Court has long made it clear that the law may not impose different penalties for "those who have committed intrinsically the same quality of offense." *McLaughlin*, 379 U.S. at 194 (citations omitted). In *McLaughlin*, the state of Florida made it a crime for unmarried interracial couples to live together, but not for unmarried same-race couples. *Id.* at 184-86. The Court struck down this law as a violation of fundamental equal protection principles. As Justice Stewart explained, it is impossible to "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. . . . [I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se." 379 U.S. at 197 (Stewart, J., concurring).

The same principle was endorsed in *Oyama v. California*, 332 U.S. 633 (1948), where a state had made it a crime for an alien to own land, but not for a citizen. *See id.* at 647-48 (Black, J. concurring) (discussing criminal penalties). The Court narrowly avoided addressing whether the state's Alien Land Law violated equal protection. But as the four concurring Justices recognized, and as the full Court surely would today, making the criminality of land ownership turn on citizenship is contrary to bedrock equal protection values. *See id.* at 647-49 (Black and Douglas, JJ. concurring), 650-51 (Murphy and Rutledge, JJ. concurring).

For the same reasons, a California law that made tending bar a crime for women but not for men was found to violate federal equal protection. *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 531 n.2, 543 (1971). The court held that making an act criminal for women but not for men was "invidious and wholly arbitrary." *Id.* at 22. Indeed, the equal protection violation was so stark that the court effectively invalidated

the law under the lowest level of review—rational basis—because it found that the state had failed "to establish any interest at all" that would be served by such a classification. *Id.; see also Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding equal protection violation where statute criminalized sale of alcohol to 18-20 year-old males but not to 18-20 year-old females); *Lamb v. Brown*, 456 F.2d 18, 20 (10th Cir. 1972) (finding equal protection violation where teenage males were held criminally responsible as adults but teenage females were not).

Similarly, when Congress made it a crime for unrelated individuals living together as a household to receive food stamps, but not for related individuals to do so, the Court found an equal protection violation. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 536 & n.8 (1973). Recognizing that the law was aimed at disadvantaging hippies, the Court explained that a "bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 534-35.

Singling out lesbians and gay men is no more permissible than singling out any other group of people for criminal penalties that depend not on the nature of the illegal act but on who performs that act. Just as the criminality of cohabiting, *see McLaughlin*, 379 U.S. at 194, owning land; *see Oyama*, 332 U.S. at 647-48 (Black, J., concurring); or tending bar, *see Sail'er Inn*, 485 P.2d 531 n.2, may not depend on the race, citizenship, or sex of the actor, the criminality of being intimate in certain ways may not depend on the sexual orientation of the actor. Certainly, Texas could not constitutionally criminalize "deviate sexual intercourse" by interracial couples but not by same-race couples; by couples made up of aliens but not citizens, or by disabled couples but not able-bodied ones. The same line, drawn at sexual orientation, offends equal protection in precisely the same manner. The Court should grant *certiorari* in this case

to clarify that making the criminality of a person's conduct depend on his sexual orientation is "invidious per se." *McLaughlin*, 379 U.S. at 197 (Stewart, J., concurring).

Any claim that the physical acts specified in the Texas law are "different" when performed by members of the opposite sex is impossible to square with the text of that statute. Texas defines "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person . . . ." Tex. Penal Code § 21.01(1).[3] Thus, deviate sexual intercourse occurs whenever a mouth touches genitalia, regardless of whether the mouth and genitalia belong to people of the same or different sexes. Under § 21.06, the identical physical acts trigger criminal liability for some people, but are perfectly legal for others. The sole dividing line between licit and illicit is whether the couple is same-sex or opposite-sex. And, as the Kansas Court of Appeals recognized in a similar case, "the argument that [a statute criminalizing same-sex but not opposite-sex conduct] is not aimed at homosexuals cannot be made with a straight face." *State v. Limon*, No. 85,898, slip op. at 6 (Kan. Ct. App. Feb. 1, 2002), *review denied*, No. 00-85898-A (Kan. June 13, 2002);[4] *see also Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992) (recognizing that, under Kentucky's same-sex sodomy law, "[s]exual preference, and not the act committed, determines criminality, and is being punished.").

The fact that the criminality of deviate sexual intercourse depends on the sexual orientation of the actors, rather than on some intrinsic difference in the acts themselves, is illustrated by analogy to the facts of *McLaughlin*, where Florida

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[3] The definition of deviate sexual intercourse also includes "the penetration of the genitals or the anus of another person with an object." Tex. Penal Code § 21.01(1).

[4] Petitioners have lodged copies of *Limon* with the Clerk of the Court.

criminalized cohabitation by interracial couples. There, the Court rejected Florida's argument that, because the cohabitants were of different races instead of the same race, the act of cohabitation was intrinsically different, and thus a separately punishable crime. 379 U.S. at 188-90 & n.7 (rejecting reliance on *Pace v. Alabama*, 106 U.S. 583 (1883)). Similarly here, the acts that Texas describes as "deviate sexual intercourse" do not become intrinsically different when the actors are of the same instead of the opposite sex. Just as race was central to what made cohabitation criminal in *McLaughlin*, so sexual orientation is central to what makes "deviate sexual intercourse" criminal here; both classifications in the criminal law are "invidious per se." *McLaughlin*, 379 U.S. at 197 (Stewart, J., concurring).

II. Sodomy Laws Inflict Acute Harms on Lesbian and Gay Individuals, Families, and Communities

In jurisdictions across the country, sodomy laws disadvantage gay and lesbian individuals, families, and communities in myriad ways. The acute and systemic harms worked by these laws make the question of their constitutionality one "the settlement of which is of importance to the public," rather than just to "the parties." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (citation omitted). Because sodomy laws, including Texas Penal Code § 21.06, cause such pervasive harm, the Court should grant *certiorari* to decide whether such laws violate the constitutional guarantees of both equal protection and due process.

Thirteen states have sodomy laws. Four of these have laws that, like the Texas provision at issue in this case, only

apply to same-sex couples.[5] Nine states have statutes that prohibit all private consensual sodomy, whether same-sex or opposite-sex.[6] Even the facially neutral laws, however, are often treated by the courts that enforce them and by the public more generally as if they targeted gay people.[7]

[5] Kan. Stat. Ann. § 21-3505(a)(1) (6 month prison term); Mo. Rev. Stat. § 566.090 (1 year) (*but see State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App., W. Div. 1999) (interpreting statute to apply only to non-consensual activity); Okla. Stat. tit. 21, § 886 (10 years) (generally applicable statute construed by *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) not to cover heterosexual consensual behavior); Texas Penal Code § 21.06 (monetary penalty).

[6] The jurisdictions with laws criminalizing all private consensual sodomy (whether same-sex or opposite-sex) are: Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3) (1 year prison term); Fla. Stat. Ann. § 800.02 (60 days); Idaho Code § 18-6605 (5 years to life); La. Rev. Stat. Ann. § 14:89 (5 years); Miss. Code Ann. § 97-29-59 (10 years); N.C. Gen. Stat. § 14-177 (3 years); S.C. Code Ann. § 16-15-120 (5 years); Utah Code Ann. § 76-5-403(1) (6 months); Va. Code Ann. § 18.2-361(A) (5 years). The Commonwealth of Puerto Rico also has a sodomy law, which makes oral and anal sex a crime for everyone, but any sexual intimacy (including touching or arguably even kissing) a crime for gay people only. P.R. Penal Code Art. 103 (6-12 years).

[7] *See, e.g.*, Virginia—*Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (denying gay father custody of his child based on court's assumption that he was engaging in unlawful sodomy; court did not assume that child's mother was engaging in sodomy despite the fact that Virginia's sodomy law covers sodomy by everyone); Utah— Floor Debate, Statement of Rep. Merrill Nelson, 49th Utah Leg., Gen. Sess. (Feb. 11, 1992) (House recording no. 1, side A) (successfully urging rejection of anti-discrimination protection for gay people because "[H]omosexuality, sodomy, is prohibited under Utah law," despite the fact that Utah bans sodomy between same- and opposite-sex couples and therefore all individuals could equally have been presumed to be committing criminal acts); Mississippi—*Weigand v. Houghton*, 730 So. 2d 581, 591 (Miss. 1999) (denying gay father custody of his son based assumption that father engaged in "homosexual activity," which is "felonious conduct" in Mississippi; no parallel assumption that child's mother similarly engaged in unlawful sodomy despite the fact that state's law criminalizes all sodomy). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws In Civil Litigation*, 79 Tex. L. Rev. 813, 829-843 (2001) (collecting examples of how lesbians and gay men are presumed to be violating

Indeed, at least one court has expressly held that lesbians and gay men were the target of a facially neutral sodomy law. *See Ex parte J.M.F.*, 730 So. 2d 1190, 1196 n.5 (Ala. 1998) (noting that the generally applicable statute was "specifically altered by the legislature 'to make all homosexual conduct criminal'") (citing commentary to Ala. Rev. Stat. §§ 13A-6-65, 13A-1-1).

A. Sodomy Laws Are Used to Justify Treating Gay People as Criminals

Sodomy laws are used to define lesbians and gay men as inherently criminal, regardless of whether they have ever been charged with a crime, and thereby to deny them a range of benefits and rights that others take for granted. *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000). While the reported cases capture only a fraction of the occasions when sodomy laws are invoked in this disabling manner, decisions in the areas of family and employment law are illustrative of the phenomenon. The fact that sodomy laws are used to disadvantage lesbians and gay men in these civil contexts makes the constitutionality of the laws a matter of crucial importance.

Family courts have often relied on sodomy laws to justify separating lesbians and gay men from their children. Sharon Bottoms lost custody of her child despite the fact that "the record show[ed] a mother . . . devoted to her son." *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995). In evaluating whether to take the boy away from his mother, the court presumed that she, as a lesbian, was acting in violation of the Virginia sodomy law: "Conduct inherent in lesbianism is

generally applicable sodomy laws and are therefore disadvantaged in family, employment, and immigration contexts).

punishable as a Class 6 felony in the Commonwealth; thus, that conduct is another important consideration in determining custody." *Id.* (citation omitted); *see also Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (denying custody to gay man and stating, "the conduct inherent in the father's relationship is punishable as a class six felony .... [W]e have no hesitancy in saying that the conditions under which this child must live daily are . . . unlawful.").

Virginia is not alone in using sodomy laws to break up families. *See, e.g., Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (changing custody from mother to father because mother was a lesbian and stating: "While the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is [not] legal in this state ....")[8]; *Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) (Cracraft, J., concurring) (denying custody of child to lesbian mother and observing "that sodomy is . . . criminal conduct. This clear declaration of public policy is certainly one that a chancellor may note and consider in child custody cases")[9]; *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982) (restricting ability of lesbian mother to visit with her child based in part on fact that

[8] *See also Ex parte H.H.*, 2002 WL 227956, at *13 (Ala. Feb. 15, 2002) (Moore, C.J. concurring) (denying custody to lesbian and stating: "Sexual relations between persons of the same gender violate both the criminal and civil laws of this State .... Any person who engages in such conduct is presumptively unfit to have custody of minor children."); *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (imposing restriction on lesbian mother's visitation with her child because "the conduct inherent in lesbianism is illegal in Alabama. R.W., therefore, is continually engaged in conduct that violates the criminal law of this state.") (citation omitted).

[9] The Arkansas Supreme Court recently struck down the state's sodomy law. *Jegley v. Picado*, No. 01-815, 2002 WL 1453664 (Ark. July 5, 2002).

"[d]eviate sexual intercourse with another person of the same sex is a crime in the State of Missouri").

Even in states where sodomy laws do not exist, courts have relied on the existence of sodomy laws in other states to justify separating parents from their children. *See, e.g., Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J. concurring in part and dissenting in part) (reversing lower court ruling because it did not restrict visitation by lesbian mother with her child and stating, despite fact that state sodomy law had been repealed in 1977, that it "appears that homosexuals, such as Lisa Chicoine, are committing felonies"); *Constant A. v. Paul C.A.*, 496 A.2d 1, 5 (Pa. Super. Ct. 1985) (denying expanded custody to lesbian mother, reasoning that "permitting the appellant the freedom to travel could clearly place the children in a situation with the mother and [her partner], where the adults could be subject to arrest and prosecution for deviant sexual behavior").

Public employers have invoked sodomy laws to justify refusing employment to lesbians and gay men. For example, Georgia's attorney general fired Robin Shahar based on his assumption that, as a lesbian, she must be violating the state's sodomy law. *Shahar v. Bowers*, 114 F.3d 1105, 1104 & n.17 (11th Cir. 1997); *see also Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (affirming rejection of lesbian applicant to the FBI in part because employee would have to work in states with sodomy laws); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 147 & n.21 (N.D. Tex. 1981) (upholding refusal to hire gay man for a non-officer position based in part on Texas sodomy law); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (approving dismissal of gay public employee because state sodomy law made him "immoral").

B. Sodomy Laws Are Used to Discredit the Voice of Lesbians and Gay Men in Political Discourse

Sodomy laws are invoked in political debates on issues ranging from whether non-discrimination laws should cover sexual orientation to whether police should gather statistics about anti-gay hate crimes. Where existing laws are brandished in political debate as critically important guides for what action government should take, the constitutionality of such laws becomes an especially "important question" that merits review by this Court. S. Ct. R. 10(c). While it is not the Court's role to weigh in on the merits of the various policy disputes (*e.g.*, whether sexual orientation should or should not be included in a hate crime statute), it is both necessary and proper for the Court to ensure that one side in a national debate is not consistently skewing the terms of that debate by invoking laws that violate the Constitution. *See, e.g., Zelman v. Simmons-Harris*, __ U.S. __, 122 S. Ct. 2460 (2002) (addressing constitutionality of school voucher programs not to decide policy debate about whether public funds should be used to support religious schools, but to answer the question, often raised in these debates, whether such use is constitutional); *Romer v. Evans*, 517 U.S. 620 (1996) (addressing constitutionality of amendment barring class of individuals from seeking anti-discrimination protection not in order to decide the policy debate about whether state and local anti-discrimination laws should include sexual orientation, but to prevent that debate from being short-circuited through unconstitutional means).

Laws prohibiting sodomy are cited in political debate to chill the participation of lesbians and gay men and to devalue their views. For example, Puerto Rico's sodomy law was used to intimidate and discredit the Reverend Margarita Sanchez de Leon, a lesbian, when she appeared before the Puerto Rico legislature to testify against legislation opposed by Puerto Rico's lesbian and gay community. *Gay Rights*

Center Stage in Puerto Rico, Seattle Gay News, Feb. 23, 2001. Others had spoken for and against the bill without incident, but as Rev. Sanchez rose to speak, a legislator inquired for the record whether she was a lesbian. The legislator then warned her that lesbians and gay men are subject to criminal prosecution under Puerto Rico Penal Code Art. 103, which proscribes sodomy. *Id.*[10]

In another stark example, the Texas Republican party pledged to provide a "big tent" for all viewpoints, and bound itself through its bylaws to the free speech requirement of the Texas constitution to make good on the promise. However, while it allowed pro-choice Republicans to attend its state convention, it balked at allowing a gay Republican group. As the party's executive director explained, "[i]n the state of Texas . . . sodomy is still a crime. I did not think we should have anything at our convention that encourages breaking the law." R.G. Ratcliffe, *Gay Republicans Win Lawsuit Against GOP*, Houston Chronicle, June 15, 1996, at 1; *see* Associated Press Newswire, *Republicans Refuse Gays' Request for Spot at State Convention*, May 26, 1996.

Sodomy laws are also used in political debates to justify denying gay people protection from discrimination and violence. In response to a proposal to enact hate crimes legislation that would cover sexual orientation, one legislator asked in debate, "Why should we pass a law protecting someone who is breaking the law?" Cherrill Crosby, *Utah Committee Fails to Reach Accord on Including Gays in Hate-Crimes Bill*, Salt Lake Tribune, Oct. 17, 1991, at B2. Ultimately, another representative concluded, "[H]omosexuality, sodomy, is prohibited under Utah law, so the effect of granting special protection . . . to homosexuals

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[10] The constitutionality of Puerto Rico Penal Code Art. 103 is currently being challenged in *Sanchez v. Secretario de Justicia*, No. AC-2000-63 (Puerto Rico S. Ct.).

would be contradictory under Utah law." Floor Debate, Statement of Rep. Merrill Nelson, 49th Utah Leg., Gen. Sess. (Feb. 11, 1992) (House recording no. 1, side A). The law did not pass.

Similarly, in Texas, the very existence of § 21.06 bolstered efforts to repeal an Austin ordinance that gave insurance benefits to the same-sex domestic partners of city employees. Opponents waged a successful repeal campaign by arguing that the benefits were "illegal because of Texas's sodomy law." Chuck Lindell, *Domestic Partners Stung By Loss of Insurance Benefits*, Austin American-Statesman, May 12, 1994, at B1. Numerous city employees instantly lost health insurance for their partners. *Id.*

Sodomy laws are also used in political debates about whether lesbians and gay men should be barred from serving as adoptive or foster parents, despite a critical national shortage of people willing to fill those roles. In Mississippi, the state's sodomy law was invoked in support of legislation precluding adoption by gay or lesbian couples. As one legislator stated, "A homosexual relationship implies the exercise of illegal activities, and no child should be permitted to enter that type of setting." Gina Holland, *Miss. Legislature Passes Ban on Adoptions by Gay Couples*, Baton Rouge Advocate, Apr. 21, 2000, at 7B. Similarly, Arkansas banned foster parenting by lesbians or gay men based in part on Arkansas's same-sex-only sodomy law. A member of the state administrative board that passed the policy explained the connection as follows: "Arkansas still has sodomy laws on the books. Based on that law, I believe that it's wrong to place our foster children in those homosexual homes." Associated Press, *Arkansas Nears Ban on Gay Foster Parents*, Dallas Morning News, Aug. 26, 1998, at 11A.

Texas's sodomy law has even been used to deny funding to organizations that provide HIV services to the gay

community. Greg Beets, *State Law Hampers Fight Against AIDS*, Daily Texan, Jan. 12, 1990, at 4; *see* Tex. Health & Safety Code Ann. §§ 85.011(a); 85.015(a)(2); 95.037(a) (banning funding of AIDS service organizations if they "advocate or promote conduct that violates state law").

C. People Are Prosecuted For Violation of Sodomy Laws

In addition to their uses in civil cases and in political discourse, sodomy laws remain part of prosecutors' arsenal and are used to arrest and convict people for private, consensual sexual activity that forms a core part of the lives of millions of Americans. The reality that these laws are enforced makes the question of their constitutionality an issue worthy of consideration by the Court.

Matthew Limon is serving a 206-month prison sentence (over 17 years) because he performed consensual oral sex on another male when they were both teenagers. *State v. Limon*, No. 85,898, slip op. at 2-3 (Kan. Ct. App. Feb. 1, 2002), *review denied*, No. 00-85898-A (Kan. June 13, 2002). Had Limon or the other teenager been a girl, Limon would be serving no more than a 15-month sentence. *Id.* at 5.

Limon's plight is a product of the interaction between Kansas's sodomy law and the state's so-called "Romeo and Juliet" law. In Kansas, criminal sodomy includes "sodomy with a child who is 14 or more years of age but less than 16 years of age." Kan. Stat. Ann. § 21-3505(a)(2). Because Kansas believes that "consensual sexual activity between a young adult and a not-quite adult, although wrong, is not as criminal as sexual activity between persons farther apart in age," *Limon*, slip op. at 6, it enacted a Romeo and Juliet law that significantly reduces the criminal penalties for sodomy where teenagers have sex with other teenagers. *See* Kan. Stat. Ann. § 21-3522(a)(2). Because Kansas limited the

application of the Romeo and Juliet law to "members of the opposite sex," *id.*, however, Limon was not eligible for the lesser penalty and was sentenced under the general sodomy statute. His sentence was almost 16 years longer than it would have been had he been a heterosexual teenager who committed precisely the same acts, with precisely the same age difference. *Limon*, slip op. at 5.[11]

Matthew Limon is not the only person who has faced serious consequences as a result of a sodomy conviction or charge. Calvin Burdine, a gay man charged with a capital crime in Texas, heard his sodomy conviction invoked to support the state's argument that he should be sentenced to death because he posed a future danger to society. *See Burdine v. Johnson*, 66 F. Supp. 2d 854, 857 (S.D. Tex. 1999) (granting writ of habeas corpus for denial of effective assistance of counsel), *aff'd*, 262 F.3d 336 (5th Cir. 2001) (en banc), *cert. denied*, *Cockrell v. Burdine*, 122 S. Ct. 2347 (2002). Kevin Devescovi lost the license to operate his bar after being charged with sodomy. *Devescovi v. Ventura*, 195 F. Supp. 2d 1146, 1147 (D. Minn. 2001) (two men arrested and charged with consensual sodomy with women in private). Numerous others have been arrested and convicted for having, or inviting, private, non-commercial, consensual sodomy. *See, e.g.*, *City of Oklahoma City v. Sawatzky*, 906 P.2d 785 (Okla. 1995) (man arrested for inviting another to have sex in private); *Christensen v. State*, 226 Ga. 474 (1996) (man arrested for inviting another to have sex in private); *see also City of Topeka v. Movsovitz*, 960 P.2d 267 (Kan. 1998), *denying review of* No. 77,372 (Kan. Ct. App. Apr. 24, 1998) (man arrested for talking about having sex

[11] Such laws are not unique to Kansas. Indeed, Texas has a comparable "Romeo and Juliet" law that is limited to heterosexual teenagers. Texas makes it a crime to have sex with a person under 17, *see* Tex. Penal Code Ann. § 21.11(a)(1), but provides an absolute affirmative defense where the teenagers are no more than 3 years apart in age "and of the opposite sex," *see id.* § 21.11(b)(1).

with another; act was criminal only because both individuals were men). Most recently, Missouri arrested adults for engaging in consensual same-sex sodomy. *See Full Assault on Sodomy Laws*, The Advocate, Aug. 20, 2002.

Sodomy laws inflict both direct and indirect harms on gay and lesbian individuals, families, and communities that are substantial and pervasive. These harms constitute "compelling reasons" for the Court to review the constitutionality of sodomy laws such as § 21.06. S. Ct. R. 10.

CONCLUSION

The Court should grant *certiorari* in this case to declare that the criminality of conduct cannot depend on the sexual orientation of the actor. It should grant review of both the equal protection and the due process questions in light of the devastating ways that sodomy laws are used in both civil and criminal contexts to disadvantage lesbians and gay men. And the Court should use this case to reconsider its ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

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In The Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas Fourteenth District

AMICUS BRIEF OF STONEWALL LAW ASSOCIATION, PARENTS, FAMILIES, & FRIENDS OF LESBIANS & GAYS, TEXAS HUMAN RIGHTS FOUNDATION, LESBIAN/GAY RIGHTS LOBBY, GAY & LESBIAN ADVOCATES & DEFENDERS, NATIONAL CENTER FOR LESBIAN RIGHTS, & HUMAN RIGHTS CAMPAIGN IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The amici[1] share an interest in challenging Texas Penal Code § 21.06, the so-called "Homosexual Conduct Law," which criminalizes certain sexual conduct for same-sex couples but not heterosexual ones. The amici are the Stonewall Law Association of Greater Houston; Parents, Families, and Friends of Lesbians and Gays of Houston; the Texas Human Rights Foundation; Lesbian/Gay Rights Lobby of Texas; Gay & Lesbian Advocates & Defenders; the National Center for Lesbian Rights; and the Human Rights Campaign.[2] Amici are a diverse group of local, state, and national organizations united by a commitment to equality for gay men and lesbians. Their work on behalf of gay and lesbian citizens includes prosecuting impact litigation, lobbying state and federal governments for non-discriminatory laws, educating the public through research and information initiatives, and providing legal and other support to persons affected by discrimination on the basis of sexual orientation.

The amici know all too well that discrimination is often rationalized by reference to same-sex sodomy laws like the one Petitioners have asked this Court to review. These organizations and their members have a special interest in ensuring that rights guaranteed by the United States Constitution are not undermined by laws like § 21.06, which contains an unwarranted sexual orientation- and sex-based classification and unfairly authorizes government intrusion into the private lives of certain

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief, in whole or in part. No person or entity, other than the amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] More detailed statements of interest from the amici are included in the attached Appendix.

citizens. The amici therefore support Petitioners application for a writ of certiorari.

SUMMARY OF THE ARGUMENT

It is critically important that the Court review the constitutionality of Texas's Homosexual Conduct Law, which criminalizes the sexual conduct of same-sex partners but permits heterosexual couples to engage in the very same acts without penalty. Such laws, whether or not enforced, have devastating effects on gay and lesbian citizens and their families. By singling out gays and lesbians as sexual criminals, § 21.06 and other same-sex sodomy laws stigmatize gays and lesbians and thereby legitimize discrimination, hatred, and even violence against them.

The huge burden that same-sex sodomy laws impose on the most private aspect of the lives of gay and lesbian citizens also merits this Court's attention. Although the law targets only same-sex couples, the objective data show that the specific sexual behavior targeted by the law is widely practiced by heterosexuals as well. There is no credible evidence that the sexual expression of gay men and lesbians is somehow deviant or detrimental. To the contrary, there is ample evidence that, as with heterosexuals, sexual intimacy is vital to the health and well-being of gay and lesbian adults and is an important component of stable, loving same-sex relationships.

Nor is it possible to identify any justification for same-sex sodomy laws that could balance these substantial harms. The traditional justification – that homosexuality poses a moral threat against which society must be defended – cannot withstand scrutiny. Despite what their proponents say, same-sex sodomy laws have little to do with "traditional morality." For example, not until 1974 did Texas first single out gays and lesbians for special condemnation.

Because the Homosexual Conduct Law targets a politically disfavored group and imposes unique and substantial harms on that group, the law simply cannot be reconciled with our highest constitutional values. This Court should grant certiorari.

ARGUMENT

I. The direct and indirect harms caused by same-sex sodomy laws make gay and lesbian Americans second-class citizens.

This Court should grant certiorari to consider the constitutionality of the Homosexual Conduct Law, Texas Penal Code § 21.06,[3] because the harms that the law inflicts on homosexual citizens of Texas are real and substantial. Although courts and commentators have sometimes presumed that sodomy laws are harmless because such laws are rarely enforced,[4] this presumption is fundamentally flawed.[5] In fact, even when unenforced,

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[3] Texas's Homosexual Conduct Law prohibits certain sex acts only when performed by same-sex partners. That law provides:

> (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.
>
> (b) An offense under this section is a Class C misdemeanor.

TEX. PEN. CODE ANN. § 21.06 (Vernon 1999). "Deviate sexual intercourse" is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01.

[4] *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring) ("The history of nonenforcement [of the statute] suggests the moribund character today of laws criminalizing this type of private, [illegible] conduct.").

[5] *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 648 (2001) (arguing that "the relevant legal actors . . . are encouraged to

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criminal laws nevertheless may have profound effects on society.[6] Laws such as Texas's Homosexual Conduct Law harm gay and lesbian citizens by inhibiting mental and emotional health, providing justification for a wide range of private and official discrimination, and facilitating anti-gay violence.[7]

First and most fundamentally, the Homosexual Conduct Law and other laws like it interfere with healthy mental and emotional development.[8] As scientific and sociological literature on the subject demonstrates,[9] sexual expression is a vital component of personal psychological well-being.[10] It is likewise essential to healthy intimate

conclude that sodomy laws do not really matter"); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 104 (2000) (undertaking a case study of sodomy laws to illustrate "how the mere existence of an 'unenforced' criminal law creates a criminal class whose members are treated as felons, even though they have been convicted of no crime").

[6] *See* Leslie, *supra* note 5, at 103.

[7] Of course, Texas's Homosexual Conduct Law *was* enforced in this case, thus negating any comfort that gays and lesbians in Texas may take from the supposed "history of nonenforcement," *Hardwick*, 478 U.S. at 198 n.2, of similar statutes in other states. Gay and lesbian Texans presently are subject to an immediate threat of prosecution, which causes fear and anxiety to them as well as their families, friends, colleagues, employers, and others in the heterosexual community.

[8] *See* Leslie, *supra* note 5, at 116-21.

[9] This Court considered evidence of such harms in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Court considered the detrimental psychological and emotional effects of school segregation on blacks. The Court looked to psychological and sociological journals to examine the social and personal implications of denying blacks equal educational opportunities. Just as the Court noted that "the impact is greater when [school segregation] has the sanction of the law," this Court should consider the harmful psychological and social impact that upholding the Homosexual Conduct Law will have on gay and lesbian Americans. *See id.* at 494.

[10] EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 360 (1994)

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relationships between adults;[11] in both heterosexual and homosexual relationships, sex functions to strengthen the partners' interpersonal bonds and as an expression of the couple's feelings for each other.[12] The Homosexual Conduct Law necessarily takes a psychological toll on gay and lesbian Texans by intruding into this most personal of activities and by penalizing intimate relations so fundamental to healthy adulthood.[13] Indeed one federal court has recognized that the Homosexual Conduct Law has a negative effect on the mental health of gay and lesbian Texans.[14]

(national study by University of Chicago finding persons who have sexual experiences report higher levels of happiness than those who have no sexual experiences); WILLIAM MASTERS & VIRGINIA JOHNSON, HUMAN SEXUAL INADEQUACY (1970); John Gonsiorek & J.R. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events, in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 161-76 (John Gonsiorek & James Weinrich eds., 1991).

[11] *See, e.g.*, PEPPER SCHWARTZ & PHILIP BLUMSTEIN, AMERICAN COUPLES 193, 201 (1983) ("[A] good sex life is central to a good overall relationship.").

[12] *Id.* at 201, 205-06; DAVID MCWHIRTER & ANDREW MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 262 (1984).

[13] Gonsiorek & Rudolph, *supra* note 10; Anthony R. D'Augelli, *Developmental Implications of Victimization of Lesbian, Gay, and Bisexual Youth, in* STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 187, 191 (Gregory M. Herek ed., 1998) (describing the psychological consequences of stigmatization on gay, lesbian, and bisexual youth).

[14] As that court explained in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985):

> [T]he existence of these criminal laws, even if they are not enforced (like § 21.06), does result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals – fear of arrest, loss of jobs, discovery, etc. – can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement officials.

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Moreover, the Homosexual Conduct Law is psychologically harmful because it "fuel[s] internalized homophobia in some homosexuals, including . . . self-derision, self-hatred, hatred of others in the group, and acting out self-fulfilling prophesies about one's own inferiority."[15] And sodomy laws necessarily inhibit – indeed all but turn into self-incrimination – what has been demonstrated to be a psychologically necessary action for many gays and lesbians: that of "coming out" to friends and family by revealing a previously repressed or hidden sexual orientation.[16] By encouraging gays and lesbians to repress or hide their sexual orientation with the threat of criminal sanction, the Homosexual Conduct Law in fact encourages conduct that may be unhealthy both mentally and physically. [17]

Id. at 1130. The district court's findings were based upon the testimony of a psychiatrist and a sociologist "whose qualifications as experts in the field of homosexuality were outstanding and whose testimony was very credible [and consistent with] the positions adopted by various medical and psychiatric associations." *Id.* at 1129, 1132.

[15] Leslie, *supra* note 5, at 117 (quoting Brief of Amici Curiae American Psychological Association and the American Public Health Association in Support of Respondents at 7, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140)).

[16] *See, e.g.*, S. Hammersmith & M. Weinberg, *Homosexual Identity: Commitment, Adjustment and Significant Others*, 36 SOCIOMETRY 56, 78 (1973) (concluding that "having . . . 'settled into' a homosexual identity . . . leads to better psychological adjustment as indicated by a more stable, positive self-image, fewer anxiety symptoms, and less depression"); J. Leserman et al., *Gay Identification and Psychological Health in HIV-Positive and HIV-Negative Gay Men*, 24 J. APPLIED SOC. PSYCHOLOGY 2193, 2205 (1994) (presenting findings that "better psychological health [is] related to gay self-acceptance, participating in gay organizations and groups, socializing with other gay men, and parental disclosure and acceptance of being gay").

[17] *See, e.g.*, G. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men, in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 197, 211 (G. Herek et al. eds., 1996) (noting that "closeted gay women and men may experience a painful discrepancy between their public

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The Homosexual Conduct Law also enables individuals and institutions to cite the fact that "homosexual conduct" is illegal in order to rationalize all manner of discrimination against gay and lesbian Texans. Because some forms of sexual expression by gays and lesbians are illegal, the argument goes, the people who participate in them are criminals. Employers, bureaucrats, school administrators, lawmakers, litigants, and others routinely use such logic to support disadvantaging gays and lesbians. For example, those who advocate depriving gays and lesbians of full citizenship have claimed that the Homosexual Conduct Law justifies closing the public library to gay groups;[18] denying permanent residence to a homosexual immigrant;[19] depriving gay parents of custody of their children;[20] prohibiting gays from fostering or adopting

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and private lives," causing them to feel "they are living a lie," and further noting that not coming out can "create considerable strain for lesbian and gay male couples, who must hide or deny their relationship to family and friends," which ultimately "may have a deleterious effect on psychological adjustment"); S. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 HEALTH PSYCHOLOGY 243 (1996) (finding that "those who concealed the expression of their homosexual identity experienced a significantly higher incidence of cancer . . . and several infectious diseases").

[18] Associated Press, *Gay Rights Supporters' Meeting Site Draws Protest*, DALLAS MORNING NEWS, Jan. 15, 1996, at 8D (describing protesters' objection to a gay group's meeting in the San Antonio public library because gays "engage in deviant conduct that is illegal under the state penal code").

[19] *See, e.g., In re Naturalization of Longstaff*, 538 F. Supp. 589, 590-92 (N.D. Tex. 1982) (rejecting plea of homosexual immigrant because he had violated the Homosexual Conduct Law and therefore lacked good moral character), *aff'd*, 716 F.2d 1439 (5th Cir. 1983).

[20] Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, HOUSTON CHRON., June 27, 1994, at A11 (reporting that common tactic of vilifying homosexual parent in custody battle is "give[n] . . . teeth" by § 21.06); *cf. Jilek v. Chatman*, 613 S.W.2d 558 (Tex. Civ. App.—Beaumont 1981, no writ) (relying, in part, on evidence

(Continued on following page)

children;[21] banning gay and lesbian student groups on college campuses;[22] opposing protection of gays and lesbians from discrimination in employment;[23] and denying gay and lesbian Texans protection under proposed hate crime legislation.[24]

Indeed, such laws routinely are used in civil litigation – particularly in the areas of family law and public employment law – to disadvantage gay people who have never even been charged, let alone convicted of any

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of father's admitted bisexuality and history of same-sex relationships to uphold order transferring custody from father to mother).

[21] Polly R. Hughes, *Bill Would Ban Gay Texans From Adopting Children*, HOUSTON CHRON., Dec. 11, 1998, at A38 (noting that the sponsor of a bill to prohibit gays from fostering or adopting children in state custody relied on Homosexual Conduct Law); *see also* Mike Ward, *Gay Groups Urge Veto of Penal Code With Sodomy Law*, AUSTIN AM. STATESMAN, May 29, 1993, at B10 (reporting that conservative groups had favored retention of the sodomy ban in the revised penal code because the law serves as a basis for denying gay and lesbian couples the right to adopt).

[22] Bruce Tomaso, *Stephen F. Austin Senate Bans Gay Group*, DALLAS MORNING NEWS, Nov. 2, 1994, at 1A (quoting student leader who said that student government voted to ban gay student group because "[w]e felt they're in contradiction to Texas state law"); *see also Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1320 n.4 (5th Cir. 1984) (quoting university administrator's argument that "it would be most inappropriate for a state institution officially to support a [gay] student organization which is likely to incite, promote and result in acts contrary to and in violation of the Penal Code of the State of Texas").

[23] Ginger D. Richardson, *Gay Rights Effort Likely to Be Tabled*, FT. WORTH STAR-TELEGRAM, Jan. 19, 1999, at 1 (reporting that city council member killed a measure to add gays and lesbians to Fort Worth antidiscrimination ordinance because it would be at odds with Homosexual Conduct Law).

[24] Stephanie E. Griest, *Hate Crimes Act Named for Byrd Heads for House*, AUSTIN AM. STATESMAN, Mar. 12, 1999, at B10 (quoting state lawmaker who opposed extending protections to gays and lesbians because "the act of homosexuals is illegal" [sic]).

crime.[25] In the area of family law, the presumption that a gay parent is violating a state sodomy law motivates the outcome in many custody decisions.[26] *See, e.g., Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (upholding restrictions on lesbian mother's visitation rights, reasoning in part that "the conduct inherent in lesbianism is illegal in Alabama" and that the mother's "[e]xposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them"); *Bottoms v. Bottoms*, 457 S.W.2d 102, 108 (Va. 1995) (noting that, although "a lesbian mother is not *per se* an unfit parent," "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth . . . ; thus, that conduct is another important consideration in determining custody"). Similarly, sodomy statutes have been used as a basis for denying public employment to homosexuals.[27] *See, e.g., Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 142-43 n.13 (N.D. Tex. 1981) ("The overriding reason that the Plaintiff was not hired [as a storekeeper for the property storeroom of the Dallas Police Department] was because he admitted to engaging in homosexual conduct prohibited by Texas penal statutes."). Thus the mere presence in a state's criminal code of a statute like the Homosexual Conduct Law is enough to stigmatize gay and lesbian citizens.[28]

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[25] *See* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 813-14 (2001).

[26] *See generally id.* at 822, 831-36.

[27] *See generally id.* at 836.

[28] The stigmatization that follows from criminalizing sex acts between same-sex partners should not be underestimated. In Texas, merely saying that another is homosexual is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *see also Plumley v. Landmark Chevrolet*, 122 F.3d 308, 310 (5th Cir. 1997) (same).

By stigmatizing gays and lesbians as "outlaws," the Homosexual Conduct Law and its counterparts in other states also contribute to an atmosphere of hatred and violence that puts gay men and lesbians at risk. As one scholar has observed, "the relationship between homosexual sodomy laws and homophobic violence is not merely coincident, but coordinate: the criminalization of homosexual sodomy and criminal attacks on gay men and lesbians work in tandem."[29] In Texas, for example, gays and lesbians are among the most frequent victims of bias-motivated crimes, including rape, robbery, murder, assault, intimidation, and vandalism.[30] Gay and lesbian youth, in particular, routinely are tormented with epithets, bullied, and even attacked by their peers,[31] often with severe consequences for their physical and mental health.[32] Sodomy laws facilitate such violence by providing a means for its perpetrators to "rationalize their violence

[29] Gregory Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 J. INTERPERS. VIOLENCE 316 (1990).

[30] According to recent hate crime statistics, only blacks were more often the victims of hate crimes. Texas Dept. of Public Safety, Crime in Texas (1997); *see also* Griest, *supra* note 24, at B10 (recounting personal stories of sister of a gay man who had been shot three times and set on fire; prominent lesbian whose neighbor threatened to kill her; minister who found a rainbow flag burning on church lawn).

[31] For example, one recent study concluded that gay, lesbian, and bisexual teens report "significantly greater exposure to violence" than their peers, are three times as likely to miss school because they feel unsafe, and are twice as likely to have been injured or threatened with a weapon at school. Anne H. Faulkner & Kevin Cranston, *Correlates of Same-Sex Sexual Behavior in a Random Sample of High School Students*, 88 AM. J. PUB. HEALTH 262, 263-64 (1998).

[32] D'Augelli, *supra* note 13, at 189-91; Gary Remafedi, *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 AM. J. PUB. HEALTH 57 (1998) (concluding that homosexual and bisexual teenagers are at greater risk of suicide than other teens).

as vigilante enforcement of sodomy laws."[33] Such laws further promote anti-gay violence by deterring homosexual victims of bias-motivated crimes from reporting those crimes to the police; "[t]his underreporting, and the consequent lower risk of arrest, encourages attacks against gay citizens."[34]

The link between the existence of sodomy laws on the books and the psychological and social harms described above is not merely speculative. Findings from recent empirical research show that laws like the Homosexual Conduct Law do, in fact, cause serious psychological and social harm to individuals, groups, and social institutions, even if unenforced.[35] One empirical study found that an "unenforced" sodomy law:

- "bolstered [gays' and lesbians'] parents' fear and hostility towards homosexuality";[36]
- supported "hostility and threats posed by individuals outside the family";[37]
- "fractured" the "relationship many people have to the law and to the police force in general," causing lesbians and gays to not "rely on

[33] Leslie, *supra* note 5, at 124 ("Many anti-gay attackers perceive themselves as performing legitimate law enforcement by bashing gay people who elude prosecution under state sodomy laws.").

[34] *Id.* at 125.

[35] Goodman, *supra* note 5. Goodman's empirical study is an ethnographic study that compared groups of South African gays and lesbians before and after the repeal of South Africa's sodomy laws. *Id.* at 647-48. South Africa was chosen because it gave an opportunity for an examination of "the social effects of sodomy laws . . . in a legal regime in which sodomy laws existed under similar conditions as they do in the United States." *Id.* at 647. "[L]ike their American counterparts, [the South African sodomy laws] were generally not enforced." *Id.* at 679.

[36] *Id.* at 692.

[37] *Id.* at 694.

the police for problems that arise in situations even tangentially related to their sexual identity;"[38]

- caused "an internal schism within those lesbian and gay individuals who wish to view themselves as law-abiding members of society;"[39] and
- played "a significant role in strengthening anti-gay ideologies in other institutions of cultural authority."[40]

Overturning § 21.06 and similar statutes is essential not only to removing the barriers to full citizenship for gay men and lesbians, but also to changing the environment of hatred and bigotry that leads to violence. This Court should reject any suggestion, therefore, that the Petitioners' constitutional challenge is somehow trivial. The direct and indirect harms that laws like the Homosexual Conduct Law cause to gay and lesbian Americans are immeasurable.

II. The Homosexual Conduct Law and other laws like it simply cannot be justified by appeals to "morality."

Section 21.06, with its discriminatory bias against same-sex intimacy, finds no support in "traditional" notions of morality. To the contrary, it is only relatively recently that such acts have been proscribed solely between people of the same sex.[41] Before the concept of a

[38] *Id.* at 708, 732.

[39] *Id.* at 732.

[40] *Id.* at 663.

[41] Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 539 (1992) (tracing historical evolution of the term "sodomy" – from a catchall description of all non-procreative sex to the modern

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unique "homosexual identity" gained currency in late nineteenth- and early twentieth-century American culture,[42] "sexual touchings between men were determined to be licit or illicit according to criteria that applied equally to heterosexual practices. . . . Although illicit sexual acts were seen as sinful, immoral, criminal, or all three, before the 1870s illicit sexual acts between men were not seen as fundamentally different from, or necessarily worse than, illicit acts between a man and a woman."[43]

Even today, of the thirteen states that outlaw sodomy, nine apply their sodomy bans to both gay and non-gay people alike.[44] Only four states, including Texas, punish

usage as a synonym for anal intercourse, particularly between two men – and documenting the attendant shifts in American law).

[42] Scholars have observed that, although same-sex relationships have been documented throughout history, the concept of homosexuality (or, for that matter, heterosexuality) as a defining characteristic of one's identity is relatively recent. Comparing modern Western notions of sexual identity to those of antiquity, for example, one scholar reports: "[T]he currently fashionable distinction between homosexuality and heterosexuality (and similarly between 'homosexuals' and 'heterosexuals' as individual types) had no meaning for the classical Athenians: there were not, so far as they knew, two different kinds of 'sexuality'. . . ." David M. Halperin, *Is There a History of Sexuality?*, *reprinted in* LESBIAN AND GAY STUDIES READER (Henry Abelove et al., eds., 1993). Making a similar point about American history, another scholar notes that "colonial society lacked even the category of homosexual or lesbian to describe a person," though colonial court records refer to incidents of sexual acts between two women or two men. John D'Emillio, *Capitalism and Gay Identity*, *in* LESBIANS, GAY MEN, AND THE LAW 26, 28 (William Rubenstein ed., 1993). It was only in the 1920s and 1930s that American scientific literature began describing homosexuality "as a condition, something that was inherent in a person, a part of his or her 'nature.'" *Id.* at 29.

[43] Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1088 (1988).

[44] *See* ALA. CODE § 13A-6-65 (1994); FLA. STAT. ANN. § 800.02 (1992); IDAHO CODE § 18-6605 (1997); LA. REV. STAT. ANN. § 14:89

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solely same-sex conduct,[45] and Texas's ban on "homosexual conduct" is only 28 years old.

The legislative history of Texas's Homosexual Conduct Law demonstrates just how recently discrimination against gay people has surfaced in American law. The first Texas sodomy statute, enacted in 1860, was interpreted to prohibit bestiality and anal sex, whether committed by husband and wife, unmarried heterosexuals, or homosexuals. *See Baker v. Wade*, 553 F. Supp. 1121, 1148 (N.D. Tex. 1982) (citing Tex. Pen. Code art. 342 (1860)), *aff'd on other grounds*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985); *Pruett v. Texas*, 463 S.W.2d 191 (Tex. Crim. App. 1970). In 1943, the statute was amended to prohibit all oral and anal sex. Tex. Pen. Code art. 524 (1943). It was not until 1974 that the Texas Legislature repealed the general prohibition on sodomy. That year the Legislature enacted the Homosexual Conduct Law, for the first time criminalizing consensual relations only between people of the same sex. *Id.* § 21.06 (Vernon's 1999). The common misconception that gays and lesbians have "always" been singled out and their sexual relations criminalized is belied by the facts.

Defenders of these modern-day same-sex sodomy statutes often resort to the position (as the State of Texas did below) that homosexuality is *malum in se*, inherently wicked or evil by its very nature.[46] But the outdated stereotype of gays and lesbians as perverted and morally corrupt has long been discredited. Modern research

(1986); MISS. CODE ANN. § 97-29-59 (1973); N.C. GEN. STAT. § 14-177 (1993); S.C. CODE ANN. § 16-15-120 (1998); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18.2-361 (1996).

[46] KAN. CRIM. CODE ANN. §§ 21-3501(2), 21-3505 (1995); MO. ANN. STAT. §§ 566.010, 566.090 (1999); OKLA. STAT. ANN. tit. 21, § 886 (1999).

[46] BLACK'S LAW DICTIONARY (6th ed. 1990).

demonstrates not only that homosexuality is "normal" (*i.e.*, a natural orientation for some people),[47] but also that gays and lesbians are productive, well-adjusted citizens.

Substantial scientific and psychological research has shown that homosexuality is not an "abnormal" condition.[48] Because of these studies, the American Psychiatric Association removed homosexuality as a mental illness from the Diagnostic and Statistical Manual of Mental Disorders in 1973.[49] Subsequent research has confirmed that gays and lesbians show no more psychopathology than heterosexuals.[50] "Indeed, virtually all systemic study

[47] Recent studies have confirmed that the number of gay men and women is between two and ten percent of the general population. *See, e.g.*, Stuart Michaels, *The Prevalence of Homosexuality in the United States, in* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, 55-56 (Robert P. Cabaj & Terry S. Stein eds., 1996).

[48] For example, as early as 1957, one landmark study concluded that homosexuality is "within the normal range, psychologically." Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18, 30 (1957); *see also* Robert B. Dean & Harold Richardson, *Analysis of MMPI Profiles of Forty College-Educated Overt Male Homosexuals*, 28(6) J. CONSULTING PSYCHOL. 483, 485 (1964) (finding no significant difference between functioning heterosexuals and homosexuals); Marcel T. Saghir et al., *Textbook of Homosexuality: III. Psychiatric Disorders and Disability in the Male Homosexual*, 126(8) AM. J. PSYCHOL. 1079, 1086 (1970) (study of 35 unmarried heterosexual men and 89 gay males finds "an absence of striking differences").

[49] AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1973) ("DSM-II"). The World Health Organization followed suit in its International Classification of Diseases, dropping the term homosexuality as a diagnosis in 1992. *See* Michael King & Annie Bartlett, *British Psychiatry and Homosexuality*, 175 BRITISH J. OF PSYCHIATRY 106, 106 (1999).

[50] Gregory M. Herek, *Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 142 (1991) (review of dozens of studies shows no relationship between gay or lesbian sexual orientation and psychopathology); James Krajeski, *Homosexuality and the Mental Health Professions: A Contemporary History, in* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, *supra*

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has shown sexual orientation to be independent of psychopathology."[51]

Nor is there any scientific reason to view the sexual practices of gay and lesbian couples as anything other than healthy and normal.[52] The sexual conduct of gays and lesbians is comparable to that of heterosexuals. The sexual activity that is the subject of the Homosexual Conduct Law is widely practiced by heterosexuals as well as homosexuals. Approximately 75% of both heterosexual men and heterosexual women have engaged in oral sex. Twenty-five percent of heterosexual men and 20% of heterosexual women have experienced anal intercourse.[53] Despite the widespread incidence of this conduct, it is *illegal* only if engaged in by people of the same sex.

Scientists and social workers also have focused on the ability of gay men and lesbians to function in society. Research repeatedly has shown that gay and lesbian parents have the same quality of parenting skills as heterosexual parents and that children raised by gay and

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note 47, at 20 (finding that, beginning in the 1960s, many studies that used standardized psychological instruments began to provide a "firm research basis for the finding that homosexuality does not equate with psychopathology").

[51] BERTRAM J. COHLER & ROBERT M. GALATZER-LEVY, THE COURSE OF GAY AND LESBIAN LIVES: SOCIAL AND PSYCHOANALYTIC PERSPECTIVE 294 (2000).

[52] For example, the transmission of disease, particularly HIV, is not peculiar to same-sex intercourse. *See, e.g., Gryczan v. Montana*, 942 P.2d 112, 124 (Mont. 1997) (noting that "heterosexual contact is now the leading mode of HIV transmission in this country"); *Kentucky v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1992) (rejecting HIV transmission as justification for Kentucky's "sodomy" law because there was no distinction "between male-male and male-female anal intercourse as a method of preventing AIDS").

[53] LAUMANN ET AL., *supra* note 10 at 318-19 (national survey of sexual practices published by the University of Chicago).

lesbian parents are as well-adjusted as children raised by heterosexual parents.[54] "As with heterosexual parents, the ability of gay and lesbian parents to foster the healthy development of their children appears to be more related to unique family dynamics and other contextual factors and less tied to parents' sexual orientation than society would have us believe."[55] Contrary to prevalent myths and stereotypes, moreover, gay men and women are no more likely than heterosexuals to commit child sexual abuse. For example, in a study of 269 children seen for sexual abuse, researchers found that only one adult offender could be identified as a lesbian and that only one offender could be identified as a gay man. In contrast, 77% of abuse against girls and 74% of abuse against boys was committed by the adult male heterosexual partner of a female family member.[56] Same-sex sodomy statutes cannot be

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[54] *See* Bonnie M. Mucklow & Gladys K. Phelan, *Lesbian and Traditional Mothers' Responses to Adult Response to Child Behavior and Self Concept*, 44 PSYCHOL. REP. 880 (1979) (finding no differences between lesbian and heterosexual mothers in self-concept, maternal attitudes, or responses to slides of children's behaviors); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992) (review of 30 studies showed "no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents"); Charlotte J. Patterson & Raymond W. Chan, *Gay Fathers and Their Children*, *in* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, *supra* note 47, at 383 (available data suggest that five to ten percent of children of gay fathers, about the same percentage as those raised by heterosexuals, grow up to be gay or bisexual).

[55] Jorge C. Armesto, *Developmental and Contextual Factors That Influence Gay Fathers' Parental Competence: A Review of the Literature*, 3 PSYCHOL. OF MEN AND MASCULINITY 67 (2002) (citations omitted) (explaining further that "children of gay and lesbian parents do not appear to differ from children of heterosexual parents in terms of gender identity development, sex role behavior, sexual orientation, mental health, self-concept, or intelligence").

[56] Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 41-42 (July 1994); *see also* Edward P.

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justified with the argument that discrimination against homosexuals or proscriptions on consensual, same-sex sexual activity are necessary for the welfare of society.[57]

Lesbians and gay men are a diverse and capable group of people. "[T]he gay male and lesbian community is diverse and multiethnic and differs by gender, socioeconomic status, and few generalizations apply across cultural borders.... Research on mental health has documented that as individuals, couples, and a social community, gay men and lesbians do not show lower levels of adjustment."[58] Far from posing a threat to society, gay men and lesbians continuously have made unique and significant contributions.[59]

Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, 58 CHILD WELFARE 127, 133 (1979) (finding abuse of boys by peer-oriented homosexual males is "scarce"); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons, in* SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 87, 89 (Barbara McComb Jones et al., eds., 1980) (finding no abuse of boys by peer-oriented homosexual males; instead, the study found that offenders either have been sexually attracted exclusively to children during their lives or are heterosexual males frustrated by their relationships).

[57] *See* American Psychiatric Ass'n, Fact Sheet: Gay and Lesbian Issues (1996) (calling for nondiscrimination on the basis of sexual orientation); American Psychol. Ass'n, Resolution of the American Psychological Association Council of Representatives (1975), <http://www.apa.org/pi/lgbpolicy/homepage.html> (same); Lesbian and Gay Issues, 38(3) NASW News (National Ass'n of Social Workers), Mar. 1993, at 15 ("NASW will support the repeal of all laws against any form of consensual adult sexual activity."); American Ass'n of Sex Educators, Counselors, and Therapists, Code of Ethics (1993), <http://www.aasect.org/code.htm> (calling for nondiscrimination on the basis of sexual orientation).

[58] Linda Garnets & Douglas Kimmel, *Lesbian and Gay Male Dimensions, in* PSYCHOLOGICAL PERSPECTIVES ON HUMAN DIVERSITY IN AMERICA 143, 174-75 (Jacqueline D. Goodchilds, ed., 1991).

[59] *See, e.g.*, T. COWAN, GAY MEN AND WOMEN WHO ENRICHED THE WORLD (1988) (discussing achievements of various individuals believed

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As the Kentucky Supreme Court held when striking down Kentucky's ban on consensual sexual relations between same-sex partners:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform.... We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.

Kentucky v. Wasson, 842 S.W.2d 487, 501 (Ky. 1992). Same-sex sodomy laws cannot be squared with the Constitution's requirement that all citizens receive equal treatment under the law. This Court should grant the writ of certiorari and address the important constitutional issues raised by these laws and the burdens they impose on gay and lesbian Americans.

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to be gay, lesbian, or bisexual, including authors, mathematicians, politicians, economists, scientists, and artists).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 19, 2002

APPENDIX

The Stonewall Law Association of Greater Houston ("Stonewall Lawyers") is a non-profit bar association founded in 1990 for the purpose of promoting human rights and, in particular, the rights of gay, lesbian, bisexual, and transgender citizens of Texas. Its members include attorneys, law professors, law students, and local lawmakers. Many of the organization's members have been in the position of defending a gay or lesbian client's rights – in the workplace, at school, as parents – against an assault justified on the grounds that "homosexual conduct" is criminal in Texas.

Parents, Families, and Friends of Lesbians and Gays of Houston, Texas ("P-FLAG") is the local chapter of an international, grassroots organization founded by parents of gays and lesbians to support, educate, and advocate for the families and friends of gays and lesbians, as well as for gays and lesbians themselves. P-FLAG actively promotes the health and well-being of gays and lesbians and their families and friends through monthly meetings, public awareness campaigns, speaker panels for educational and corporate institutions, scholarships to deserving high school seniors and college students, lobbying and testifying at legislative hearings, and individual support via a telephone hotline and the Internet. P-FLAG parents regularly suffer with their children the harms that come from discrimination based on their son's or daughter's sexual orientation, including harassment, violent crimes, vandalism, threats, and loss of employment. The mere existence of same-sex sodomy statutes (no matter how rarely enforced) exacerbates these problems, as the statutes often are used to rationalize and excuse such discrimination.

The mission of the Texas Human Rights Foundation (the "Foundation") is to end discrimination against lesbian, gay, bisexual, and transgendered persons, and persons with HIV and AIDS, through public education,

high impact litigation, and legal assistance. The Foundation sponsors a hotline for Texans who have questions about their rights or need legal help because of discrimination, and it publishes a widely distributed resource booklet, *AIDS & the Law*, in both English and Spanish. As part of its litigation strategy, the Foundation funded two earlier legal challenges to Texas's same-sex sodomy statute. The Foundation believes that Petitioners' case presents this Court with an important opportunity finally to resolve whether same-sex sodomy statutes are unconstitutional.

The Lesbian/Gay Rights Lobby of Texas ("LGRL") works toward the elimination of social, legal, and economic discrimination based on sexual orientation through lobbying, education and research directed toward the Texas Legislature and other state governmental agencies. LGRL has advocated for the rights of gay and lesbian Texans on issues such as discrimination in the workplace and in public schools and colleges, hate crime legislation, and increased protections and services for people living with HIV. During the 2001 legislative session, LGRL once again lobbied for the repeal of Texas's Homosexual Conduct Law. Due in part to LGRL's efforts, the bill to repeal § 21.06 was voted out of the House Criminal Justice Committee, but it was not brought to a vote before the legislative session adjourned. The Texas Legislature does not reconvene until 2003.

Gay & Lesbian Advocates & Defenders ("GLAD") is a public interest law firm founded in 1978. GLAD's mission is to secure and advocate for the legal rights and interests of lesbians, gay men, and bisexuals, and it does so through litigation and public education in the six New England states. GLAD has considerable legal expertise in the area of civil rights and civil liberties for gay men, lesbians, and bisexuals. Throughout its nearly 25-year history, GLAD has represented individuals who have been charged with violating laws regulating intimate conduct in several states. GLAD challenged the Massachusetts sodomy law

in *GLAD v. Reilly*, 436 Mass. 132 (2002) as well as the Rhode Island law, *State v. Lopes*, 660 A.2d 707 (R.I. 1995). GLAD believes these laws impose a stigma on gay people and that persons charged under these laws face a serious risk of harm to their physical safety as well as to their professional livelihood if they are publicly identified.

Since 1977 the National Center for Lesbian Rights ("NCLR") has advocated for fairness and equality for lesbians under the law. NCLR's legal advocacy extends to gay men, bisexual and transgendered individuals as well, primarily in the areas of family security and protection, elder law, rights of youth and fair immigration policy. NCLR has witnessed first-hand the ravages of "homosexual conduct" laws on the fair and objective application of the law to lesbians and gay men in this country. From child custody cases to employment or protection of youth from harassment, such laws are deployed to deny lesbians and gay men equal treatment under the law.

The Human Rights Campaign ("HRC") is America's largest gay and lesbian organization, with over 450,000 members nationwide. HRC lobbies lawmakers for fairer laws, educates the public through information initiatives, helps define the national debate on public policies important to gay and lesbian Americans, and through its bipartisan PAC, works to elect fair-minded candidates to public office. HRC is dedicated to ensuring that gay, lesbian, bisexual and transgender Americans can be open, honest and safe at home, at work, and in the community.

PETITIONER'S

BRIEF

(8)

Supreme Court, U.S.
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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

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QUESTIONS PRESENTED

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes adult, consensual same-sex intimate behavior, but not identical behavior by different-sex couples – violate the Fourteenth Amendment right to equal protection of the laws?

2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

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The State of Texas arrested Petitioners Lawrence and Garner, charged them with a crime, and convicted them under the State's "Homosexual Conduct" law for engaging in consensual same-sex intimacy in the privacy of Lawrence's home. The Texas law and Petitioners' convictions are constitutionally indefensible for two reasons. First, the law discriminates without a legitimate and rational State purpose, in violation of the Equal Protection Clause. In 1973, Texas broke with both the evenhanded laws of the past and the decisive modern trend toward decriminalization. Instead, the State chose to criminalize consensual, adult sexual behaviors *only* for those whose partners are of the same sex – gay men and lesbians. Texas's decision to classify along that line brands gay men and lesbians as lawbreakers and fuels a whole range of further discrimination, effectively relegating them to a form of second-class citizenship. Second, this criminal law directly implicates fundamental interests in intimate relationships, bodily integrity, and the home. Texas's law and the few other remaining consensual sodomy statutes – both those that discriminate and those that do not – trample on the substantive liberty protections that the Constitution erects in order to preserve a private sphere shielded from government intrusion. Here, where the State authorizes such intrusion into the homes and lives only of same-sex couples, the constitutional injury is especially clear and disturbing.

OPINIONS AND ORDERS BELOW

The Texas Court of Criminal Appeals' orders refusing discretionary review are unreported. Pet. App. 1a, 2a. The decision of the *en banc* Court of Appeals for the Fourteenth District of Texas is reported at 41 S.W.3d 349. Pet. App. 4a. The court's prior panel opinion is unreported. Pet. App. 80a. The judgments of the Harris County Criminal Court are unreported. Pet. App. 107a, 109a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2001. Pet. App. 3a. On April 17, 2002, the Texas Court of Criminal Appeals denied a timely consolidated petition for

discretionary review. Pet. App. 1a, 2a. Petitioners filed their timely petition for a writ of certiorari in this Court on July 16, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor."

Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Petitioners' Arrests, Convictions, and Appeals.

Late in the evening of September 17, 1998, Harris County, Texas, sheriff's officers entered John Lawrence's home and there intruded on Lawrence and Tyron Garner having sex. The officers were responding to a false report of a "weapons disturbance." Pet. App. 129a, 141a.[1] They arrested Petitioners, jailed them, and did not release them from custody until the next day. Clerk's Record in *State v. Lawrence*, at 3 ("C.R.L."); Clerk's Record in *State v. Garner*, at 3 ("C.R.G.").

The State charged Petitioners with violating the Texas "Homosexual Conduct" statute, Tex. Pen. Code § 21.06 (the "Homosexual Conduct Law" or "Section 21.06"), which

[1] The person who called in the report later admitted his allegations were false and was convicted of filing a false report. *See* R.A. Dyer, *Two Men Charged Under State's Sodomy Law*, Hous. Chron., Nov. 6, 1998, at A1.

criminalizes so-called "deviate sexual intercourse" with another person of the same sex, but not identical conduct by different-sex couples. *Id.* The sole facts alleged by the State to make out a violation were that each Petitioner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." Pet. App. 127a, 139a. The State did not allege that the conduct was public, non-consensual, with a minor, or in exchange for money. *Id.* The charges rested solely on consensual, adult sexual relations with a partner of the same sex in the privacy of Lawrence's home. *Id.*

After proceedings and initial convictions in the Justice of the Peace Court, Petitioners appealed for a trial *de novo* to the Harris County Criminal Court. C.R.L. 15; C.R.G. 12. They filed motions to quash the charges on the ground that the law violates the Fourteenth Amendment's guarantees of equal protection and privacy, both on its face and as applied to their "consensual, adult, private sexual relations with another person of the same sex." Pet. App. 117a-118a, 121a-122a, 130a-131a, 134a-135a. On December 22, 1998, the court denied the motions to quash. Pet. App. 113a. Lawrence and Garner then pled *nolo contendere*, Pet. App. 114a, preserving, under Texas procedural rules, their right to pursue previously asserted defenses. Tex. Code Crim. P. § 44.02. The court imposed on each a fine of $200 and court costs of $141.25. Pet. App. 107a-108a, 109a-110a, 116a.

In consolidated appeals to the Texas Court of Appeals, Lawrence and Garner argued that Section 21.06 impermissibly discriminates between citizens "[u]nder any characterization of the classification." Amended Brief of Appellants at 4, 5, 6-17 (Tex. App. filed Apr. 30, 1999) ("Am. Br."); Additional Brief of Appellants 1 n.1, 14-22 (Tex. App. filed Aug. 11, 2000) ("Add'l Br."); Petition for Discretionary Review at 7-13 (Tex. Crim. App. filed Apr. 13, 2001) ("Pet. Disc. Rev."). Petitioners also argued that the statute invades their right of privacy and preserved their contention that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was wrongly decided. Am. Br. 5, 23-26; Add'l Br. 23 n.20; Pet. Disc. Rev. 16-19.

At oral argument in the Court of Appeals, counsel for the State conceded that "he could not 'even see how he could begin to frame an argument that there was a compelling State interest'" served by Section 21.06. Pet. App. 76a (quoting counsel for Texas). Texas has repeatedly identified its only aim as "enforcement of principles of morality and the promotion of family values." *See, e.g.*, State's Brief in Support of Rehearing En Banc 16 (Tex. App. filed Aug. 23, 2000) ("States' Br. in Supp. of Reh'g En Banc").

On June 8, 2000, a panel of the Court of Appeals reversed Petitioners' convictions under the Texas Equal Rights Amendment, holding that Section 21.06 impermissibly discriminates on the basis of sex. Pet. App. 86a-92a. After rehearing *en banc*, the Court of Appeals reinstated Petitioners' convictions on March 15, 2001. Pet. App. 3a, 4a. Citing *Bowers*, the court rejected Petitioners' substantive due process claim. Pet. App. 24a-31a. As to the federal equal protection claim, the court held that the statute was subject to and survived rational basis review, because it "advances a legitimate state interest, namely, preserving public morals." Pet. App. 13a. The court distinguished *Romer v. Evans*, 517 U.S. 620 (1996), as limited to discrimination in the right to seek legislation. Pet. App. 14a-15a.

Two Justices of the appellate court "strongly" dissented from the rejection of Petitioners' federal equal protection arguments. Pet. App. 42a. The dissent reasoned that:

> where the same conduct, defined as "deviate sexual intercourse[,]" is criminalized for same sex participants but not for heterosexuals[,] [t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict.

Pet. App. 44a. Petitioners timely sought discretionary review from the Texas Court of Criminal Appeals, which was refused. Pet. App. 1a, 2a.

B. The Homosexual Conduct Law

The Homosexual Conduct Law is of comparatively recent

vintage. It was enacted in 1973 when Texas repealed all of its then-existing laws that criminalized private sexual conduct between consenting adults. *See* 1973 Tex. Gen. Laws ch. 399, §§ 1, 3. Prior to that time, the criminality of consensual sexual conduct in Texas did not depend on whether a couple was same-sex or different-sex. In particular, oral as well as anal sex was a crime for all. 1943 Tex. Gen. Laws ch. 112, § 1. *See generally Baker v. Wade*, 553 F. Supp. 1121, 1148-53 (N.D. Tex. 1982) (reviewing history of Texas sodomy laws), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc).[2] Until 1973 Texas also criminalized fornication and adultery. *See* Tex. Pen. Code arts. 499-504 (1952) (repealed by 1973 Tex. Gen. Laws, ch. 399, § 3).

The 1973 repeals abolished all those crimes, 1973 Tex. Gen. Laws ch. 399, § 3, freeing heterosexual adult couples, married or unmarried, to engage in all forms of consensual, private, noncommercial sexual intimacy without state intrusion. In the same enactment, however, the Legislature adopted Section 21.06, *see id.* § 1, which for the first time singled out same-sex couples for criminal sanctions. Section 21.06 applies to "deviate sexual intercourse," which is defined as oral, anal, and certain other sexual conduct without regard to whether the actors are of the same or different sexes. *See* Tex. Pen. Code § 21.01(1).[3] But "deviate sexual intercourse" is *not* a crime when engaged in

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[2] Before 1943, an 1860 statute criminalized "the abominable and detestable crime against nature," Tex. Pen. Code art. 342 (1860); *see Baker*, 553 F. Supp. at 1148, which was held *not* to apply to oral sex. *See, e.g., Munoz v. State*, 281 S.W. 857 (Tex. Crim. App. 1926); *Prindle v. State*, 21 S.W. 360, 361 (Tex. Crim. App. 1893). Like the 1943 law, however, the 1860 statute applied to heterosexual as well as homosexual conduct. *See Adams v. State*, 86 S.W. 334 (Tex. Crim. App. 1905); *Lewis v. State*, 35 S.W. 372 (Tex. Crim. App. 1896).

[3] The present definition of "deviate sexual intercourse" reflects a 1981 amendment adding § 21.01(1)(B) to encompass penetration with "objects," which has been construed to include any part of the body. *See C.M. v. State*, 680 S.W.2d 53, 55-56 (Tex. App. 1984). In 1993, facing a sunset provision, Texas reenacted most of the Penal Code, including Section 21.06. *See* 1993 Tex. Sess. Law Serv. ch. 900 (Vernon). Several attempts to repeal the law have failed, *see, e.g.*, H.B. 687, 2001 Leg. 77th (R) Sess. (Tex.); *see also Baker*, 553 F. Supp. at 1126 & n.4, 1151.

privately by two consenting adults of different sexes. Rather, Section 21.06 criminalizes only "Homosexual Conduct," making it a punishable offense to engage in "deviate sexual intercourse with another individual of the same sex," but not identical conduct by heterosexual couples. Tex. Pen. Code § 21.06.[4]

Texas, of course, also has and enforces other laws that criminalize sexual conduct that takes place in public, Tex. Pen. Code §§ 21.07(a)(2), 21.08, that is violent or without consent, *id.* § 22.011(a)(1), that is in exchange for money, *id.* § 43.02, or that is committed with a minor, *id.* §§ 22.011(a)(2), 21.11. All of these prohibitions apply without regard to whether the actors are of the same or different sexes. Section 21.06, in contrast, applies to non-commercial, consensual, private sexual conduct between two adults – but only if they are of the same sex.

Because it singles out same-sex couples, this Texas law is unlike older legal prohibitions of "sodomy," *see infra* Point I.A.3, and differs fundamentally from the facially evenhanded Georgia law considered by the Court in *Bowers*, *see* 478 U.S. at 188 n.1. The Homosexual Conduct Law was substituted for a facially nondiscriminatory law at a time when many States, prompted by changing views about the proper limits of government power that were reflected in the American Law Institute's *Model Penal Code*, were revising their criminal codes and completely abandoning offenses like fornication and sodomy. *See Model Penal Code and Commentaries* §§ 213.2 cmt. 2, 213.6 note (1980). By 1986, 26 States had invalidated their sodomy laws. *Bowers*, 478 U.S. at 193-94. Today, only nine States retain criminal laws that bar consensual sodomy for all.[5] Between 1969 and 1989, Texas and seven other States legislatively replaced general laws with laws targeting homosexual couples. *See infra* at 21-22 &

[4] "Homosexual conduct" is a Class C misdemeanor punishable by a fine of up to $500. Tex. Pen. Code §§ 21.06(b), 12.23.

[5] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(A).

note 15. Four of those discriminatory laws have already been judicially invalidated, and one has been repealed. *See id.* Now only Texas and two other States criminalize same-sex conduct but not identical different-sex conduct by statute, while one other State has reached the same result through judicial construction of a facially evenhanded law.[6] Similarly, all but a few States have repealed criminal laws prohibiting fornication. *Infra* note 18.

Since its enactment, Section 21.06 has narrowly survived several federal and state constitutional challenges. In *Baker v. Wade*, a federal district court held that Section 21.06 violates the constitutional rights of privacy and equal protection. 553 F. Supp. at 1125. The court rejected the State's claimed justifications for Section 21.06 and found that, even when not enforced, the law results in serious harms to gay persons, including employment discrimination. *Id.* at 1130, 1146-47. Although the Texas Attorney General withdrew the State's appeal, a divided *en banc* Fifth Circuit allowed an appeal by an intervenor and reversed, citing the summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc).

In the early 1990s, Texas Courts of Appeals declared Section 21.06 unconstitutional in two cases exercising state equity jurisdiction. *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993); *State v. Morales*, 826 S.W.2d 201 (Tex. App. 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994). In both cases, the intermediate appellate court struck down the Homosexual Conduct Law under the Texas Constitution and found that the statute inflicted severe harms beyond the direct threat of criminal convictions. *See England*, 846 S.W.2d at 959; *Morales*, 826 S.W.2d at 202. As the State itself stipulated in *Morales*, Section 21.06

[6] Kansas and Missouri have same-sex-only statutes, Kan. Stat. Ann. § 21-3505(a)(1); Mo. Rev. Stat. § 566.090, although one intermediate court of appeals in Missouri has held that State's statute applicable only to non-consensual conduct, *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999). Oklahoma's general statute has been construed to exclude different-sex couples. Okla. Stat. tit. 21, § 886; *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986).

"brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law." *Id.* at 202-03.

In 1994, *Morales* was set aside by the Texas Supreme Court as reaching beyond the power of the State's equity courts. 869 S.W.2d at 943-47. The court ruled that constitutional review should occur in the context of a criminal prosecution, with final review in the Texas Court of Criminal Appeals. *Id.*[7] In the present criminal case, however, the Court of Criminal Appeals refused to exercise its jurisdiction to review the validity of the law, Pet. App. 1a, 2a, leaving its burdens in effect throughout Texas.

SUMMARY OF ARGUMENT

As the experience of Lawrence and Garner vividly illustrates, Section 21.06 puts the State of Texas inside its citizens' homes, policing the details of their most intimate and private physical behavior and dictating with whom they may share a profound part of adulthood. Texas has enacted and enforced a criminal law that takes away – from same-sex couples only – the freedom to make their own decisions, based upon their own values and relationships, about the forms of private, consensual sexual intimacy they will engage in or refrain from. The State defends this law only by saying the majority wants it so. Texas asserts a power of the majority to free itself from state dictates about private, consensual sexual choices, while using the criminal law to condemn and limit the choices of a minority.

This law and its application to Petitioners violate both the guarantee of equal protection *and* fundamental liberties safeguarded by the Fourteenth Amendment. Petitioners explain below why the equality claim and the liberty claim are each well rooted in the Constitution. The Court, however, need not rule on both constitutional violations if it chooses to focus on one

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[7] Although the Texas Supreme Court did not review *England*, due to a jurisdictional defect in that court, *see Morales*, 869 S.W.2d at 942 n.5 (noting dismissal of writ of error in *England* without reaching merits), the state supreme court's ruling in *Morales* removed the underpinnings of *England*.

infirmity rather than the other. Petitioners discuss the fundamental liberty claim under the Due Process Clause first, because even if the Court were not to reach that issue, a full appreciation of the personal interests affected by Section 21.06 also illuminates and informs the equal protection analysis that follows.

Fundamental liberty and privacy interests in adults' private, consensual sexual choices are essential to the ordered liberty our Constitution protects. The State may not, without overriding need, regiment and limit this personal and important part of its citizens' lives. More so than in 1986, when *Bowers v. Hardwick* was decided, it is clear today that such a fundamental right is supported by our basic constitutional structure, by multiple lines of precedent, and by a decisive historical turn in the vast majority of the States to repudiate this type of government invasion into private life. The well-established fundamental interests in intimate relationships, bodily integrity, and the sanctity of the home all converge in the right asserted here. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). That right belongs to all Americans, including gay men and lesbians, and should be shielded from Section 21.06's unjustified invasion. Much more is needed to outweigh fundamental individual interests than the majority's preferences. Indeed, the Fourteenth Amendment's protection of liberty exists to guard against the very impulse Texas acted on here. Principles of *stare decisis* do not, in these circumstances, justify adherence to *Bowers*.

Texas also has violated the Fourteenth Amendment's guarantee of equal protection of the laws. The Homosexual Conduct Law creates classes of persons, treating the same acts of consensual sexual behavior differently depending on who the participants are. By this law, Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not. The law's discriminatory focus sends the message that gay people are

second-class citizens and lawbreakers, leading to ripples of discrimination throughout society. Such a discriminatory law cannot satisfy even the minimal requirement that a legislative classification must be rationally related to a legitimate State purpose. *See Romer*, 517 U.S. 620. The bare negative attitudes of the majority, whether viewed as an expression of morality, discomfort, or blatant bias, cannot take away the equality of a smaller group. *See id.*; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

ARGUMENT

I. Section 21.06 Violates Constitutional Rights to Liberty and Privacy Possessed by All Americans.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. It is well settled that the Due Process Clause of the Fourteenth Amendment guarantees the personal liberty of Americans against encroachment by the States, and that this protection of liberty encompasses substantive fundamental rights and interests that are unenumerated. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Casey*, 505 U.S. at 846-51; *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494, 501-03 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold*, 381 U.S. at 482-85; *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). Giving substance to "liberty" is necessary to maintain the individual freedoms that are the essence of American democracy, while also allowing government action that is justified by the collective good. *See Casey*, 505 U.S. at 849-51.

Among the liberties protected by the Constitution is the right of an adult to make choices about whether and in what manner to engage in private consensual sexual intimacy with another adult, including one of the same sex. This extremely personal

sphere implicates three aspects of liberty that have long been recognized as fundamental: the interests in intimate associations, in bodily integrity, and in the privacy of the home. For the State to limit and dictate the intimate choices of American couples in this realm without any substantial justification is repugnant to ordered liberty. *Stare decisis* does not require continued adherence to the Court's contrary decision in *Bowers*.

A. American Adults Have Fundamental Liberty and Privacy Interests in Making Their Own Choices About Private, Consensual Sexual Relations.

1. Well-Established Protections for Intimate Relationships, Bodily Integrity, and the Privacy of the Home Converge in This Vital Freedom.

Being forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals. Equally repugnant is any form of external compulsion to engage in sexual relations. There should be no doubt, then, that the Constitution imposes substantive limits on the power of government to compel, forbid, or regulate the intimate details of private sexual relations between two consenting adults.

All adults have the same fundamental liberty interests in their private consensual sexual choices. This fundamental protection is rooted in three well-recognized aspects of personal liberty – in intimate relationships, in bodily integrity, and in the privacy of the home. These aspects of liberty should not be viewed as "a series of isolated points," but are part of a "rational continuum" that constitutes the full scope of liberty of a free people. *Casey*, 505 U.S. at 848 (quotation marks omitted); *see also Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed"). Sexual intimacy marks an intensely personal and vital part of that continuum.

The Court has recognized that "choices to enter into and maintain certain intimate human relationships must be secured

against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619; *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987).

The adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association. The Court has rightly recognized that regulation of the private details of sexual relations between two adults sharing an intimate relationship has "a maximum destructive impact upon that relationship." *Griswold*, 381 U.S. at 485. *Griswold* struck down a law that intruded directly into a married couple's private sexual intimacy – and thus their intimate relationship – by criminalizing the use of contraceptives and allowing intercourse only if accompanied by the risk of pregnancy. *Id.* at 485-86. Since *Griswold*, the Court has recognized that all adults, regardless of marital status or other facets of their relationship, have the same interest in making their own intimate choices in this area. *See Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person") (emphasis in original); *Casey*, 505 U.S. at 898 ("The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power"); *id.* at 852 (reaffirming *Eisenstadt* and *Griswold*).

Sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). One's sexual orientation, the choice of

one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty. *Cf. Casey*, 505 U.S. at 851.[8] Thus, the essential associational freedom here is the freedom to structure one's own private sexual intimacy with another adult. Section 21.06 utterly destroys that freedom by forbidding most sexual behavior for all same-sex couples, whether they are in a committed, long-standing relationship, a growing one, or a new one.

State regulation of sexual intimacy also implicates the liberty interest in bodily integrity. "It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity." *Casey*, 505 U.S. at 849 (citations omitted); *see also id.* at 896 ("state regulation . . . is doubly deserving of scrutiny . . . [where] the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman"). Stated generally, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Glucksberg*, 521 U.S. at 777 (Souter, J., concurring) (quotation marks omitted); *see also id.* at 720; *Rochin v. California*, 342 U.S. 165, 166, 173-74 (1952); *Cruzan*, 497 U.S. at 278.

Control over one's own body is fundamentally at stake in sexual relations, involving as they do the most intimate physical interactions conceivable. Like the decision whether to continue or terminate a pregnancy, or the decision whether to permit or decline medical procedures, the physical, bodily dimensions of how two persons express their sexuality in intimate relations are profoundly personal. Indeed, consent is a critically important dividing line in legal and societal views about sexuality for the

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[8] For many adults in modern society, sexual intimacy is an important aspect of forming or building a committed relationship where one does not already exist. *See Roberts*, 468 U.S. at 618 (Constitution protects "the *formation* and preservation" of "highly personal relationships") (emphasis added); Richard A. Posner, *Sex and Reason* 349 (1992) ("Consensual sex in whatever form is as we know a method of cementing a relationship").

very reason that individual control over sexual activity is of fundamental importance to every person's autonomy. Texas invades the liberty interest in bodily integrity by dictating that citizens may not share sexual intimacy unless they perform acts approved by the legislature, and by attempting to coerce them to select a sexual partner of the other sex.

The liberty interest at issue here also involves the deeply entrenched interest in the privacy of the home. "In the home, [the Court's] cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (emphasis in original); *Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (overnight guest receives protection under "everyday expectations of privacy that we all share"). The importance of shielding the home from intrusion goes beyond the Fourth Amendment. In *Frisby v. Schultz*, 487 U.S. 474 (1988), for example, the Court relied on the constitutional status of the home in rejecting a First Amendment challenge to an ordinance against picketing targeted at a home. *Id.* at 484 ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society") (quotation marks omitted). And constitutional protection for the home was an important consideration in *Griswold* itself. *See* 381 U.S. at 485 (rejecting intrusion into "sacred precincts of marital bedrooms"). "[I]f the physical curtilage of the home is protected, it is surely as a result of the solicitude to protect the privacies of the life within." *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting); *see also Stanley v. Georgia*, 394 U.S. 557 (1969).

Even without actual physical entry by the police, Section 21.06 directly invades the privacy of the home by criminalizing the private intimate conduct taking place there. *Poe*, 367 U.S. at 549, 551-52 (Harlan, J., dissenting). But this case also graphically illustrates how laws criminalizing consensual adult sexual intimacy permit invasion of the privacy of the home in the starkest sense. Although Petitioners do not challenge the lawfulness of the police entry into Lawrence's home in response to a report

of an armed gunman, the officers did not withdraw after discovering the report was false. Instead, under license of Section 21.06, they multiplied their intrusion exponentially by scrutinizing the specific intimate acts in which Petitioners were involved, arresting them, hauling them off to jail, and charging them with a crime for which they were later convicted.

Denying the existence of a liberty interest in private consensual adult sexual activity would give constitutional legitimacy to the grossest forms of intrusion into the homes of individuals and couples. To investigate this "criminal" conduct, the police could use every investigative method appropriate when ordinary criminal activity, such as drug use or distribution, occurs in the home: obtaining warrants to search for physical evidence of sexual activity; interrogating each member of the couple about the intimate details of the relationship; and surveillance, wiretaps, confidential informants, and questioning of neighbors. That these routine police methods are so repugnant and unthinkable in the context of adult consensual sexual relations is a strong indication that the conduct at issue differs in a fundamental way from ordinary criminal conduct that happens to occur in the home. *Cf. Romer*, 517 U.S. at 645 (Scalia, J., dissenting) ("'To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution'") (quoting Kadish, *The Crisis of Overcriminalization*, 374 Annals of Am. Acad. of Pol. & Soc. Sci. 157, 161 (1967)).[9]

The core liberty interests at stake in this case are a bulwark against an overly controlling and intrusive government. The "fundamental theory of liberty upon which all governments in

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[9] The argument here in no way implies that ordinary criminal conduct may find refuge in the home. In the present context, "the privacy of the home is constitutionally protected not only because the home is seen as a sanctuary, privileged against prying eyes, but also because it is the place where most intimate associations are centered." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 634 (1980) (footnote omitted); *see also Poe*, 367 U.S. at 551 (Harlan, J., dissenting) ("[t]he home derives its pre-eminence as the seat of family life").

this Union repose excludes any general power of the state to standardize," *Pierce*, 268 U.S. at 535, or "to coerce uniformity," *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

> The right of privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.... People do not meaningfully govern themselves if their lives are . . . molded into standard, rigid, normalized roles.

Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 783, 804-05 (1989).

2. There Is No Constitutional Exception to Liberty for Gay and Lesbian Citizens.

Gay and lesbian Americans have the same liberty interests as heterosexuals in private consensual sexual intimacy free from unwarranted intrusion by the State. Gay adults, like their heterosexual counterparts, have vital interests in their intimate relationships, their bodily integrity, and the sanctity of their homes. Today, family lives centered on same-sex relationships are apparent in households and communities throughout the country. Likewise, the special interplay between the privacy of the home and individual decisions about sexual expression applies to lesbians and gay men as it does to others.

A gay or lesbian sexual orientation is a normal and natural manifestation of human sexuality. A difference in sexual orientation means a difference only in that one personal characteristic. Mental health professionals have universally rejected the erroneous belief that homosexuality is a disease. For example, in 1973 the American Psychiatric Association concluded that "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[10] For gay adults, as for heterosexual ones, sexual

[10] *Resolution of the American Psychiatric Ass'n* (Dec. 15, 1973), 131 Am. J. Psychiatry 497 (1974); *accord* American Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633

expression is integrally linked to forming and nurturing the close personal bonds that give humans the love, attachment, and intimacy they need to thrive. *See, e.g.*, Lawrence A. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples, in Sexuality in Close Relationships* 177-91 (K. McKinney & S. Sprecher eds., 1991); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 119-20 (2000). "[M]ost lesbians and gay men want intimate relationships and are successful in creating them. Homosexual partnerships appear no more vulnerable to problems and dissatisfactions than their heterosexual counterparts." Letitia A. Peplau, *Lesbian and Gay Relationships, in Homosexuality* 177, 195 (J. Gonsiorek & J. Weinrich eds., 1991). Same-sex relationships often last a lifetime, and provide deep sustenance to each member of the couple. *See, e.g.*, A. Steven Bryant & Demian, *Relationship Characteristics of American Gay and Lesbian Couples*, 1 J. Gay & Lesbian Soc. Servs. 101 (1994).

That gay Americans have exactly the same vital interests as all others in their bodily integrity and the privacy of their homes is so plain that it appears never to have been disputed in the law. In contrast, the vital liberty interest that gay adults have in their intimate relationships has not always been recognized. Even a few decades ago, intense societal pressure, including many anti-gay government measures, ensured that the vast majority of gay people hid their sexual orientation – even from their own parents – and thus hid the important intimate relationships that gave meaning to their lives. *See infra* Point II.B.2. Lesbians and gay men, moreover, were falsely seen as sick and dangerous. *See infra* at 46. As recently as 1986, it was still possible not to perceive the existence and dignity of the families formed by gay adults. *See, e.g., Bowers*, 478 U.S. at 191, 195.

Today, the reality of these families is undeniable. The 2000 United States Census identified more than 600,000 households

(1975); National Ass'n of Social Workers, *Policy Statement on Lesbian and Gay Issues, reprinted in* Nat'l Ass'n of Social Workers, *Social World Speaks: NASW Policy Statements* 162, 162-65 (3d ed. 1994).

of same-sex partners nationally, including almost 43,000 in Texas. These families live in 99.3% of American counties.[11] Many state and local governments and thousands of private employers have adopted domestic partner benefits or more extensive protections for same-sex couples.[12] Virtually every State permits gay men and lesbians to adopt children individually, jointly and/or through "second-parent adoptions" that are analogous to stepparent adoptions. *See, e.g., Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1374 n.1 (S.D. Fla. 2001) (observing that Florida is currently "the only state" "to statutorily ban adoption by gay or lesbian adults"); American Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.12 cmt. f, at 312 (2002). These and other legal doctrines have secured parental bonds for many of the estimated millions of children in the United States with gay parents. Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 341 & n.1 (Feb. 2002) (estimating one to nine million children with at least one lesbian or gay parent); *see also, e.g., T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (allowing claim for partial custody by lesbian second parent under *in loco parentis* doctrine).

The reality of these families cannot be disregarded just because they do not match the "nuclear" model of a married couple with their biological children. *See, e.g., Troxel*, 530 U.S. at 63 ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household"); *id.* at 85 (Stevens, J., dissenting); *id.* at 98-101 (Kennedy, J., dissenting); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.3 (1989) (plurality opinion) ("The family unit accorded traditional respect in our society . . . includes

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[11] *See* William B. Rubenstein, *et al.*, *Some Demographic Characteristics of the Gay Community in the United States* 3 (Table 1), 5 (Williams Project, UCLA School of Law 2003), *available at* http://www1.law.ucla.edu/~erg/pubs/GD/GayDemographics.pdf (accessed Jan. 15, 2003).

[12] *See Employers That Offer Domestic Partner Health Benefits, available at* http://www.hrc.org/worknet/dp/index.asp (accessed Jan. 15, 2003).

the household of unmarried parents and their children"). For gay men and lesbians, their family life – their intimate associations and the homes in which they nurture those relationships – is every bit as meaningful and important as family life is to heterosexuals.

Thus, the liberty interest at issue here should not be defined in terms of sexual orientation as the "right of homosexuals to engage in acts of sodomy," *Bowers*, 478 U.S. at 191, or reduced in value on that account. If heterosexual adults have a fundamental interest in consensual sexual intimacy, including the choice to engage in oral or anal sex, then so too must homosexual adults. The Due Process Clause itself does not distinguish among classes of citizens, extending the Constitution's shield to the highly personal associations and choices of some, but not protecting the very same associations and choices for others. These liberties are important to and protected for all Americans.

3. Objective Considerations Support Recognition of Fundamental Interests Here.

To ensure that its decisions in this area are firmly grounded, the Court has sought objective guideposts for the recognition of fundamental liberties. *See County of Sacramento v. Lewis*, 523 U.S. 833, 857-58 (1998) (Kennedy, J., concurring, joined by O'Connor, J.) (emphasizing that "objective considerations," including but not limited to "history and precedent," determine substantive due process interests). As just discussed, this Court's precedents and our constitutional structure indicate that the personal liberty protected by the Constitution must include adults' private choices about sexual intimacy. Foremost among other guideposts has been the history of legislation concerning the matter at hand, from prior centuries through the present. *See, e.g., Glucksberg*, 521 U.S. at 710-19.

In reviewing relevant legal traditions, the Court has made clear that protected liberty interests are not limited to those explicitly recognized when the Fourteenth Amendment was ratified. *Casey*, 505 U.S. at 847, 850 ("such a view would be

inconsistent with our law"); *Rochin*, 342 U.S. at 171-72 ("To believe that . . . judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges"). Abundant examples exist of the Court giving meaning to contemporary truths about freedom, where earlier generations had failed to acknowledge and specify an essential aspect of liberty. *See, e.g., Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Roe*, 410 U.S. at 152-53; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold*, 381 U.S. at 482-85; *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-400. *See generally Casey*, 505 U.S. at 847-48.

Similarly, in cases *rejecting* asserted liberty interests, the Court's decisions have never rested on past legal history alone. Because constitutional "tradition is a living thing," *Casey*, 505 U.S. at 850 (quotation marks omitted), the Court has always deemed it essential that the relevant legal tradition have continuing vitality today. In *Glucksberg*, for example, the Court rejected the claimed liberty interest in doctor-assisted suicide based not only on the common law's criminalization of assisted suicide, but also on the fact that "the States' assisted-suicide bans have in recent years been reexamined and, generally" – with a single exception – "reaffirmed." 521 U.S. at 716; *see also Michael H.*, 491 U.S. at 127. Even in *Bowers*, the Court looked not only to criminal laws concerning sodomy in 1787 and 1868, but also to the fact that half the States continued to outlaw such conduct in 1986. 478 U.S. at 192-94.[13]

[13] The Court has repeatedly rejected the notion that fundamental rights encompass only those recognized at "the most specific level" at the time the Fourteenth Amendment was adopted. *Casey*, 505 U.S. at 847-59; *Michael H.*, 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (the Court's cases have discussed "asserted rights at levels of generality that might not be 'the most specific level' available"). While the Court has sought carefully to describe fundamental liberty interests, as Petitioners do in this case, careful description means neither restriction to the most specific level nor limitation to historically recognized rights. Moreover, to the extent the Court prefers to characterize the asserted right parallel to the historical legal treatment, laws regulating consensual sex between adults,

Over the last half century, the Nation has firmly broken from its prior legal tradition of criminalizing many adult choices about private sexual intimacy. Even before 1960, however, the relevant legal tradition is more complicated than an initial examination might reveal. *Bowers* observed that when the Fourteenth Amendment was ratified, 32 of 37 States had criminal laws against sodomy. 478 U.S. at 192-93. But a critical feature of those 19th-century and earlier laws was not discussed by the *Bowers* majority: Almost without exception, such laws historically have applied to certain specified sex acts without regard to whether same-sex or different-sex couples were involved. *See, e.g.*, Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1082-86 (1988).[14] In addition, actual prosecutions for *private* intimacy have been exceedingly rare since the Nation's founding. *See* John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 66-67 (1988). And the scope of the specific sexual conduct covered has varied over time. *See, e.g.*, Goldstein, 97 Yale L.J. at 1085-86.

Texas law is a case in point. A Texas statute adopted in 1860 penalized "the abominable and detestable crime against nature" for all persons, Tex. Pen. Code art. 342 (1860); *supra* note 2, and an amendment in 1943 extended that ban to oral sex for all persons, 1943 Tex. Gen. Laws ch. 112, § 1. *See supra* at 5. Only in 1973 did Texas – like a handful of other States in the same period – replace its general ban with one that singled out the sexual intimacy of same-sex couples for criminal prohibition.

and state decisions to abolish such regulation, have almost always been written generally – *not* specifically to apply only to same-sex relationships.

[14] In 1868, at most three of the 32 States with sodomy prohibitions limited them to sexual conduct between two men; even in those three States, however, there is some uncertainty whether heterosexual couples were also covered. *See* Goldstein, 97 Yale L.J. at 1084 nn.60 & 66. Statutes using the word "mankind" frequently included sexual relations between men and women, as was the case in Texas. *See Lewis*, 35 S.W. at 372 ("Woman is included under the term 'mankind'"). In any event, three of 37 States is no legal tradition.

1973 Tex. Gen. Laws ch. 399, §§ 1, 3.[15] Thus, our Nation has no longstanding legal tradition of defining permissible or prohibited sexual conduct in terms of sexual orientation. Rather, the tradition exemplified by actual legislation is one of facial neutrality. The few discriminatory laws singling out lesbians and gay men show the divide that existed in the 1970s and 1980s between the majority's view of its own liberties and its lingering anti-gay attitudes.

Most importantly, however, both evenhanded and discriminatory bans on private sexual conduct between consenting adults have been rejected in contemporary times. Since the 1960s, there has been a steady stream of repeals and state judicial invalidations of laws criminalizing consensual sodomy and fornication.[16] "The unmistakable trend . . . nationally . . . is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom." *Jegley v. Picado*,

[15] *See also* 1977 Ark. Acts 828 (struck down by *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002)); 1969 Kan. Sess. Laws ch. 180, *codified at* Kan. Stat. Ann. § 21-3505; 1974 Ky. Laws ch. 406 (struck down by *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)); 1977 Mo. Laws sec. 1, § 566.090, *codified at* Mo. Rev. Stat. § 566.090; 1973 Mont. Laws ch. 513 (struck down by *Gryczan v. State*, 942 P.2d 112 (Mont. 1997)); 1977 Nev. Stat. ch. 598 (repealed by 1993 Nev. Stat. ch. 236); 1989 Tenn. Pub. Acts ch. 591 (struck down by *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996)).

[16] "With nonmarital sex so utterly commonplace, the word *fornication*, with its strong pejorative connotation, has virtually passed out of the language." Posner, *Sex and Reason* 55 (emphasis in original). Likewise, "sodomy" is a term now used rarely outside legal contexts, while oral sex and anal sex are openly discussed in the media and society.

Consensual sodomy and fornication have been the *only* criminal laws in American history where the State has acted solely to limit forms of intimacy by consenting adults. Other crimes relating to sexuality have included additional elements reflecting other state concerns. Adultery and bigamy laws, for example, aim to enforce the legal marriage contract. Incest and under-age sex laws, *inter alia*, seek to protect vulnerable individuals who may not be capable of true consent. Prostitution and public-sex laws address commercial or public interactions that have a negative impact on the larger community. This case concerns the narrow but important freedom to choose the expressions of sexual intimacy one shares with another adult partner in private, and does not challenge these other types of State regulation.

80 S.W.3d 332, 356 (Ark. 2002) (Brown, J., concurring). By 1986, when *Bowers* was decided, 26 States had already removed consensual sodomy laws from their criminal codes. *See* 478 U.S. at 193-94. Today, only 13 States still have such prohibitions.[17] Moreover, of those 13 States, Texas and the three others that have discriminatory rules have eliminated criminal prohibitions in this area for the vast majority of adult couples. Similarly, only six States and the District of Columbia still criminalize fornication.[18] In contrast, when *Loving* was decided in 1967, 16

[17] Repeal or invalidation of same-sex-only sodomy laws since *Bowers*: 1993 Nev. Stat. ch. 236 (repealing Nev. Rev. Stat. § 201.193); *Jegley*, 80 S.W.3d 332 (Ark.); *Wasson*, 842 S.W.2d 487 (Ky.); *Gryczan*, 942 P.2d 112 (Mont.); *Campbell*, 926 S.W.2d 250 (Tenn.).

Repeal or invalidation of facially evenhanded sodomy laws since *Bowers*: 2001 Ariz. Legis. Serv. 382 (West) (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10-14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Williams v. State*, No. 98036031/CL-1059, 1998 Extra LEXIS 260 (Md. Cir. Ct. Balt. City Oct. 15, 1998); *Michigan Org. for Human Rights v. Kelley*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001). In Maryland, Michigan, and Minnesota, the States did not appeal the lower court decisions striking down the laws.

One state high court upheld a sodomy law against a constitutional challenge in recent years. *See State v. Smith*, 766 So. 2d 501 (La. 2000).

[18] As with sodomy laws, fornication laws have been struck down as contrary to the right of privacy protected by state constitutions. *See, e.g., In re J.M.*, No. SO2A1432, 2003 WL 79330 (Ga. Jan. 13, 2003) (invalidating Ga. Code Ann. § 16-6-18). The fornication laws remaining in seven jurisdictions criminalize any act of sexual intercourse between unmarried persons. *See* D.C. Stat. Ann. § 22-1602; Idaho Code § 18-6603; Mass. Gen. Laws ch. 272, § 18; *id.* ch. 277 § 39; Minn. Stat. § 609.34; Utah Code Ann. § 76-7-104; Va. Code Ann. § 18.2-344; W. Va. Code § 61-8-3. Seven other States, although purporting in some cases to proscribe "fornication," prohibit a narrower category of sexual intercourse between unmarried persons, such as where it is "open and notorious," 720 Ill. Comp. Stat. 5/11-8; N.D. Cent. Code § 12.1-20-10, or where the parties cohabit or engage in habitual intercourse, Fla. Stat. Ann. § 798.02; Mich. Comp. Laws Ann. § 750.335; Miss. Code Ann. § 97-29-1; N.C. Gen. Stat. § 14-184; S.C. Code Ann. §§ 16-15-60, 16-15-80. *See generally* Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 99-102 (1996) (summarizing criminal fornication and cohabitation laws;

States still had criminal laws against interracial marriage. *Loving*, 388 U.S. at 6 n.5; *see also id.* at 12 (holding that such laws violate fundamental liberty).

The "consistency of the direction of change" among the States, *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 (2002), is indicative of a strong national consensus reflecting profound judgments about the limits of government's intrusive powers in a civilized society. The principles and sentiments that have led the States to eliminate these laws are yet another objective indicator of the fundamental interests at stake. For example, when the Georgia Supreme Court struck down, under the state constitution, the very law upheld by this Court in *Bowers*, it stated: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998); *accord, e.g., Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) ("all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation"); *Campbell v. Sundquist*, 926 S.W.2d 250, 261 n.9 (Tenn. App. 1996) ("Infringement of such individual rights cannot be tolerated until we tire of democracy and are ready for communism or a despotism"); *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) ("regulat[ing] the private [sexual] conduct of consenting adults . . . exceeds the valid bounds of the police power"); *State v. Ciuffini*, 395 A.2d 904, 908 (N.J. Super. Ct. App. Div. 1978) (because consensual sodomy law only "serves as an official sanction of certain conceptions of desirable lifestyles, social mores, or individualized beliefs, it is not an appropriate exercise of the police power"). Legislative repeals reflect the same deep-seated values. As Governor Jane Hull said when signing the bill repealing Arizona's sodomy law, "At the end of the day, I returned to one of my most basic beliefs about government – It does not belong in our private lives." Howard Fischer, *Hull*

Arizona's and New Mexico's laws cited therein were since repealed, *see* 2001 Ariz. Legis. Serv. ch. 382, § 1 (West); 2001 N.M. Laws ch. 32).

OKs Repeal of 'Archaic' Sex Laws, Ariz. Daily Star, May 9, 2001, at A1.

A final confirmation underscoring that America has repudiated a role for government as enforcer of permitted forms of intimacy is the virtually non-existent enforcement today of the laws that still are on the books. In the 13 States that still proscribe sodomy, the laws are almost never enforced in criminal proceedings against private consensual intimacy. *See Bowers*, 478 U.S. at 198 n.2 (Powell, J., concurring) ("prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades"); *Morales*, 826 S.W.2d at 203 ("The State concedes that it rarely, if ever, enforces § 21.06"). But as this rare case of prosecution vividly demonstrates, the laws remaining on the books still sometimes strike like lightning, causing the grossest of governmental invasions of privacy through criminal enforcement. The Court should recognize the liberty interests that Petitioners and all Americans have in being free from such invasions.

B. Texas Cannot Justify Section 21.06's Criminal Prohibition of Petitioners' and Other Adults' Private Sexual Intimacy.

Recognition of the fundamental liberty interest at stake here does not end the inquiry, for due regard must also be given to any countervailing interests the State may have and the means used to achieve them. The Court has rejected rigid or mechanical tests in this area. Rather, it has given careful consideration to any weighty governmental interests that stand opposed to a fundamental liberty interest, and has looked closely at the degree and nature of the burden on the liberty interest, before ruling on the ultimate question of constitutionality. *See, e.g., Casey*, 505 U.S. at 849-51 (opinion of Court); *id.* at 871-79 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.); *Troxel*, 530 U.S. at 73 (plurality opinion); *id.* at 101-02 (Kennedy, J., dissenting); *Cruzan*, 497 U.S. at 280-81.

Here, however, there is no countervailing State interest remotely comparable to those weighed by this Court in other recent cases involving fundamental liberties, such as the State's interests in protecting the potentiality of human life, *Casey*, 505 U.S. at 871-79 (opinion of O'Connor, Kennedy, and Souter, JJ.), in protecting the welfare of children, *see Troxel*, 530 U.S. at 73 (plurality opinion), or in protecting and preserving existing human life, *Cruzan*, 497 U.S. at 280-81. *See also Glucksberg*, 521 U.S. at 728-35 (reviewing numerous "important and legitimate" interests furthered by ban on assisted suicide).

In stark contrast to those cases, counsel for Texas has conceded that Section 21.06 furthers no compelling state interest. Pet. App. 76a. The sole justification urged throughout this litigation by the State is the majority's desire to espouse prevailing moral principles and values. *See, e.g.*, State's Br. in Supp. of Reh'g En Banc 16. The State claims no distinct harm or public interest other than a pure statement of moral condemnation. This Court, however, has never allowed fundamental freedoms to be circumscribed simply to enforce majority preferences or moral views concerning deeply personal matters. *See, e.g., Casey*, 505 U.S. at 850-51. Indeed, the discriminatory moral standard employed in the Homosexual Conduct Law is illegitimate under the Equal Protection Clause. *See infra* Point II.

In arriving at the constitutional balance, the Court must also consider that Texas is using "the full power of the criminal law." *Poe*, 367 U.S. at 548 (Harlan, J., dissenting). Section 21.06 empowered the police to inspect closely Lawrence and Garner's intimate behavior in Lawrence's home and haul them off to jail. Although prosecutions may be rare and wholly arbitrary, this case shows that the criminal penalties of such laws are on occasion enforced. Criminal sanctions always impose an extreme burden.

Lawrence and Garner were arrested and held in custody for more than a day – a humiliating invasion of personal dignity. "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief.... And once the period of custody is over, the fact of the

arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting). Petitioners now each have a criminal conviction for private consensual sexuality. This "finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties." *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2398 (2002).

Moreover, "[t]he Texas courts have held that the crime of homosexual conduct ... is a crime involving moral turpitude." *In re Longstaff*, 538 F. Supp. 589, 592 (N.D. Tex. 1982) (citation omitted), *aff'd*, 716 F.2d 1439 (5th Cir. 1983). Petitioners' convictions therefore disqualify or restrict Lawrence and Garner from practicing dozens of professions in Texas, from physician to athletic trainer to bus driver.[19] In four states, Lawrence and Garner are considered sex offenders and would have to register as such with law enforcement.[20] And while Section 21.06 does not authorize imprisonment as a penalty, prison terms can be imposed in the 12 other States with sodomy prohibitions, in some cases up to ten years.[21]

Even where there is no direct enforcement, Section 21.06

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[19] *See, e.g.*, Tex. Occ. Code § 164.051(a)(2)(B) (physician); *id.* § 301.409(a)(1)(B) (registered nurse); *id.* § 401.453(a) (speech-language pathologist); *id.* § 451.251(a)(1) (athletic trainer); *id.* § 1053.252(2) (interior designer); *id.* § 2001.102 (bingo licensee); Tex. Transp. Code § 512.022(f) (school bus driver); Tex. Alco. Bev. Code § 11.46(a)(3) (liquor sales).

[20] *See* Idaho Code § 18-8304; La. Rev. Stat. Ann. § 15:541; Miss. Code Ann. § 45-33-23; S.C. Code Ann. § 23-3-430.

[21] *See* Ala. Code §§ 13A-6-60(2), 13A-5-7(a)(1) (one year); Fla. Stat. Ann. §§ 800.02, 775.082(4)(b) (60 days); Idaho Code § 18-6605 (five years); Kan. Stat. Ann. §§ 21-3505, 21-4502(1)(b) (six months); La. Rev. Stat. Ann. 14:89 (five years); Miss. Code Ann. 97-29-59 (ten years); Mo. Rev. Stat. §§ 566.090, 558.011 (one year); N.C. Gen. Stat. §§ 14-177, 15A-1340.17 (one year); Okla. Stat. tit. 21, § 886, *amended by* 2002 Okla. Sess. Law Serv. ch. 460, § 8 (West) (ten years); S.C. Code Ann. § 16-15-120 (five years); Utah Code Ann. §§ 76-5-403(1), 76-3-204(2) (6 months); Va. Code Ann. §§ 18.2-361, 18.2-10 (five years).

intrudes into the privacy of innumerable homes by regulating the actual physical details of how consenting adults must conduct their most intimate relationships. As discussed above, *see supra* Point I.A., such an invasion starkly offends the fundamental freedom of adulthood that is at stake. The Homosexual Conduct Law's absolute criminal ban is a harsh burden for all covered by the law.

The balance in this case thus heavily favors individual liberty. Texas's justification – amounting to a mere declaration that the State disapproves of same-sex couples engaging in the conduct at issue, in the absence of any asserted public need or harm – cannot be sufficient. *See Casey*, 505 U.S. at 850-53; *Roe*, 410 U.S. at 162; *Poe*, 367 U.S. at 548 (Harlan, J., dissenting). If it were, the power of the government to restrict liberty interests would be unlimited. The very meaning of fundamental liberty interests is that this kind of decision – affecting the most personal and central aspects of one's life – should be made by the individual, not the State.

While Texas may advocate a majority view about sexual morality, it may not excessively burden the liberty interests of those citizens who profoundly disagree. *See, e.g., Maher v. Roe*, 432 U.S. 464, 475-76 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity . . . . Constitutional concerns are greatest when the State attempts to impose its will by force of law"). Texas may not impose its particular view through the intrusive force of a criminal law regulating the very forms of physical intimacy that consenting adults may choose in the privacy of their own homes. By claiming the power to impose its own moral code where constitutional guarantees of personal liberty are at stake, Texas is reversing the proper relationship between the government and a free people.

The Court long ago made clear that the Constitution "excludes any general power of the state to standardize its children" because "[t]he child is not the mere creature of the state." *Pierce*, 268 U.S. at 535; *accord Troxel*, 530 U.S. at 68 (plurality opinion). Yet, what

Texas claims here is the power to standardize its adult citizens and render them mere creatures of the State by compelling conformity in the most private and intimate personal matters. By vote of the majority, one particular view of how to conduct one's most private relationships is imposed on all. But "fundamental rights may not be submitted to vote; they depend on the outcome of no election." *Barnette*, 319 U.S. at 638. The precepts advocated by Texas, aimed at "submerg[ing] the individual," are "wholly different from those upon which our institutions rest." *Meyer*, 262 U.S. at 402. Section 21.06 unjustifiably infringes the personal liberty and privacy guaranteed by the Constitution and should be struck down.

C. *Bowers* Should Not Block Recognition and Enforcement of These Fundamental Interests.

Vindication of Petitioners' constitutionally protected liberty interests should not be blocked by continued adherence to *Bowers*. In light of the fundamental interests at stake and the consistent and profound legal, political, and social developments since *Bowers*, principles of *stare decisis* do not bar the Court's reconsideration of that decision.

Stare decisis is a "principle of policy," not an "inexorable command." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (quotation marks omitted); *see also, e.g., Agostini v. Felton*, 521 U.S. 203, 235-36 (1997) (same). That is "particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Seminole Tribe*, 517 U.S. at 63 (quotation marks omitted). For these reasons, the Court has not hesitated to overrule earlier constitutional decisions that have been recognized as erroneous. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828 & n.1 (1991) (surveying cases); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J.S. Ct. Hist. 13 (same).

Where, as here, a prior decision has erroneously *denied* a fundamental constitutional right of citizens over and against the State and no countervailing rights of other individuals are at stake, there is a compelling need to correct the error. *See, e.g.,*

Barnette, 319 U.S. at 630-42 (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)); *see also, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). That is especially true here, because laws of the kind upheld by *Bowers* – whether facially evenhanded or discriminatory – are used to legitimize widespread discrimination against gay and lesbian Americans. *See infra* Point II.B.1. Indeed, the holding of *Bowers* itself has been cited as justifying state-sponsored discrimination. *See, e.g., Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious"); *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (same).

In this respect *Bowers* is fundamentally different from decisions like *Roe* or *Miranda v. Arizona*, 384 U.S. 436 (1966), which recognized individual rights that then became incorporated into the very fabric of our society. *See Casey*, 505 U.S. at 854; *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Indeed, there are no considerations like those identified in *Casey* or other *stare decisis* cases that might favor continued adherence to *Bowers*.

Unlike the right recognized in *Roe* and its progeny, there is no pattern of individuals who "have relied reasonably on the [*Bowers*] rule's continued application" to their advantage, *Casey*, 505 U.S. at 855; *see also, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233 (1995). Individuals have only been harmed by the *Bowers* decision. Nor has *Bowers* become "part of our national culture," *Dickerson*, 530 U.S. at 443. Just the opposite is true. Developments in the law and in the facts – or in society's perception of the facts, *see Casey*, 505 U.S. at 863 – have steadily eroded any support for *Bowers*. Since *Bowers*, the Nation has continued to reject the extreme intrusion into the realm of personal privacy approved in that case, so that now three-fourths of the States have repealed or invalidated such laws – including the very law upheld by *Bowers*. *See supra* Point I.A.3.

Also since *Bowers*, the Nation has steadily moved toward

rejecting second-class-citizen status for gay and lesbian Americans. In *Romer*, this Court held that venerable equal protection principles protect gay and lesbian Americans against invidious discrimination. Thirteen States and the District of Columbia, plus countless municipalities – including at least four in Texas – have now added sexual orientation to laws barring discrimination in housing, employment, public accommodations, and other areas.[22] More than half the States now have enhanced penalties for hate crimes motivated by the victim's sexual orientation.[23] And the reality of gay and lesbian couples and families with children has been increasingly recognized by the law and by society at large. *See supra* at 17-19. This is thus a case in which the Court must respond to basic facts and constitutional principles that the country has "come to understand already, but which the Court of an earlier day . . . had not been able to perceive." *Casey*, 505 U.S. at 863; *see also, e.g., Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (*stare decisis* must give way when necessary "to bring [the Court's] opinions into agreement with experience and with facts newly ascertained") (quotation marks omitted).

Bowers is an isolated decision that, like the cases overturned in *Payne*, was "decided by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings." *Payne*, 501 U.S. at 828-29. Far from being "an essential feature of our legal tradition," *Mitchell v. United States*, 526 U.S. 314, 330 (1999), *Bowers* stands today as "a doctrinal anachronism discounted by society," *Casey*, 505 U.S. at 855. Many of the bedrock principles of

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[22] 1999 Cal. Legis. Serv. ch. 592 (West); 1991 Conn. Legis. Serv. 91-58 (West); Human Rights Act of 1977, D.C. Laws 2-38; 1991 Haw. Sess. Laws Act 2; 2001 Md. Laws ch. 340; 1989 Mass. Legis. Serv. ch. 516 (West); 1993 Minn. Sess. Law Serv. ch. 22 (West); 1999 Nev. Stat. ch. 410; 1997 N.H. Laws ch. 108; 1991 N.J. Sess. Law Serv. ch. 519 (West); 2002 N.Y. Laws ch. 2; 1995 R.I. Pub. Laws ch. 95-32; 1992 Vt. Acts & Resolves 135; 1981 Wis. Laws ch. 112; Austin, Tex., City Code, vol. I, tit. VII; Dallas, Tex., Mun. Ordinance 24927 (May 8, 2002); Fort Worth, Tex., Code of Ordinances ch. 17, art. III; Houston, Tex., City Code ch. 2, tit. XIV.

[23] *See* Nat'l Gay and Lesbian Task Force, *Hate Crime Laws in the U.S., available at* http://www.ngltf.org/downloads/hatecrimeslawsmap.pdf (accessed Jan. 14, 2003).

contemporary constitutional law were announced in cases overruling contrary precedent – whether after only a few intervening years, or following decades of legal, political, and social development. *See, e.g., Barnette*, 319 U.S. at 630; *Brown*, 347 U.S. at 494-95; *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964). As in those cases, the Court "cannot turn the clock back." *Brown*, 347 U.S. at 492-93. It accordingly should overturn *Bowers* and protect the fundamental liberty interests of Petitioners.

II. Section 21.06 Discriminates Without Any Legitimate and Rational Basis, Contrary to the Guarantee of Equal Protection.

Texas's Homosexual Conduct Law violates the Fourteenth Amendment for the additional reason that it "singl[es] out a certain class of citizens for disfavored legal status," *Romer*, 517 U.S. at 633, in violation of the most basic requirements of the Equal Protection Clause. The statute directly conflicts with the Constitution's "commitment to the law's neutrality." *Id.* at 623. It fails equal protection scrutiny even under the deferential "rational basis" standard.[24] And this discriminatory classification is "embodied in a criminal statute . . . where the power of the State weighs most heavily," a context in which the Court "must be especially sensitive to the policies of the Equal Protection Clause." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

By its terms, Section 21.06 treats the *same* consensual sexual behavior differently depending on *who* the participants are. The

[24] Heightened equal protection scrutiny is appropriate for laws like Section 21.06 that use a sexual-orientation-based classification. It is also appropriate where, as here, the law employs a gender-based classification to discriminate against gay people. The classification in this law, however, does not even have a legitimate and rational basis.

Of course, if the Court agrees with Petitioners that the challenged law invades a fundamental liberty, analysis of the law's discriminatory classification would be as stringent as the analysis outlined in Point I. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 337 (1972). In this Point II, Petitioners urge a distinct constitutional violation that does not depend on the Court finding that a fundamental liberty is at stake.

behaviors labeled "deviate sexual intercourse" by Texas are widely practiced by heterosexual as well as gay adults.[25] But the statute makes this common conduct illegal only for same-sex couples and not for different-sex ones. Tex. Pen. Code § 21.06. And the State offers only a tautological, illegitimate, and irrational purported justification for such discrimination.

The group targeted and harmed by the Homosexual Conduct Law is, of course, gay people. Gay people have a same-sex sexual orientation and heterosexuals have a different-sex one. *See, e.g.*, John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy* 1 (J. Gonsiorek & J. Weinrich eds., 1991) ("sexual orientation is erotic and/or affectional disposition to the same and/or opposite sex"); *cf. Romer*, 517 U.S. at 624, 626-31 (in civil rights laws, "sexual orientation" is defined by an individual's "choice of sexual partners" or "heterosexuality, homosexuality or bisexuality"). The Homosexual Conduct Law overtly uses that defining characteristic to set up its disparate treatment. Section 21.06 "prohibit[s] lesbians and gay men from engaging in the same conduct in which heterosexuals may legally engage." *Morales*, 826 S.W.2d at 204; *see also Wasson*, 842 S.W.2d at 502 (where same-sex but not different-sex sodomy is criminalized, "[s]exual preference, and not the act committed, determines criminality, and is being punished").

A straightforward application of the rational basis test shows that this law and Texas's attempted justification for it cannot satisfy the requirement that every classification must at least "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633. When broader realities and history are considered, as this Court appropriately does in any equal protection case, the constitutional violation is only magnified.

[25] *See, e.g.*, Edward O. Laumann *et al.*, *The Social Organization of Sexuality* 98-99 (1994) (comprehensive study by University of Chicago researchers of sexual practices of American adults, finding that approximately 79% of all men and 73% of all women had engaged in oral sex, and 26% of all men and 20% of all women had engaged in anal sex).

The Homosexual Conduct Law and its badge of criminality function to make gay people unequal in myriad spheres of everyday life and continue an ignominious history of discrimination based on sexual orientation. Ultimately, the equal protection and liberty concerns in this case reinforce one another, and further underscore that this unequal law and its broad harms are intolerable in this country.

A. Section 21.06's Classification Is Not Rationally Related to Any Legitimate Purpose and Serves Only the Illegitimate Purpose of Disadvantaging One Group.

"[C]onventional and venerable" principles require that legislative discrimination must, at a minimum, "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633, 635; *see also, e.g., Cleburne*, 473 U.S. at 446; *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981). This test is deferential, but meaningful.

> [E]ven in the ordinary equal protection case . . . , [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sort of laws it can pass; and it marks the outer limits of [the judiciary's] own authority.

Romer, 517 U.S. at 632.

Under the Equal Protection Clause, the *classification* – the different treatment of different people – is what must be justified. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (rational basis review searches for "distinguishing characteristics" between the two groups that are "relevant to interests the State has the authority to implement") (quotation marks omitted); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out"); *McLaughlin*, 379 U.S. at 191 ("courts must reach and determine the question whether the

classifications drawn in a statute are reasonable in light of its purpose – . . . whether there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded"). The classification must be rationally connected to an independent and permissible government objective to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

Section 21.06 fails that essential test. As the Supreme Court of Kentucky observed in striking down that State's discriminatory consensual sodomy law on state equal protection grounds:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform . . . . The question is whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment.

Wasson, 842 S.W.2d at 501. That court found no "rational basis for different treatment," and emphasized that "[w]e need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice." *Id.*; *accord Jegley*, 80 S.W.3d at 353 ("[w]e echo Kentucky in concluding that 'we can attribute no legislative purpose to this statute except to single out homosexuals'"). That conclusion applies with equal force to the identical classification employed by Texas's law.

When Texas enacted Section 21.06 in the early 1970s, there was no "practical necessity" to draw a classification among its residents with regard to the subject matter of consensual, adult oral and anal sex. *Cf. Romer*, 517 U.S. at 631. For decades, the State had included an evenhanded prohibition on those acts within its criminal code. When the legislature determined that its old law was unduly intrusive, it had the obvious choice of repealing

it for *all* its citizens – as three-fourths of the States have done. *See supra* at 23 & note 17. Instead, it decided to single out same-sex couples for intrusive regulation and condemnation, and to free all heterosexual couples to make their own choices about particular forms of intimacy.

Throughout this litigation, the only justification that Texas has offered for this discriminatory classification is the moral judgment of the majority of its electorate. The State asserts that its "electorate evidently continues to believe" that the discriminatory line drawn by the Homosexual Conduct Law is desirable because it expresses the majority's moral views. Pet. Opp. 18.

The Homosexual Conduct Law's classification fails rational basis analysis, for several reasons. *First*, the State's position amounts to no "independent . . . legislative end" at all. *Cf. Romer*, 517 U.S. at 633. This "justification" merely restates that Texas believes in and wants to have this criminal law. The Equal Protection Clause requires that the State's classification serve a distinct legislative end – an objective or purpose – independent of the classification itself. There must be a "link between classification and objective," *id.* at 632, or "some relation between the classification and the purpose it serve[s]," *id.* at 633. The test would be meaningless – a mere rubberstamp for discrimination – unless the purpose is independent of the classification. But the "justification" offered by Texas is circular and not an independent objective served. In the words of the dissenters below, "[t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict." Pet. App. 44a.

The State's approach gives *carte blanche* to presumed majority sentiment, and leaves those targeted by a discriminatory law without recourse. If majority moral or value judgments were enough to answer an equal protection challenge, the amendment struck down in *Romer* would have survived, because the votes of a majority of Coloradans clearly signaled that including gay people within civil rights protections was antithetical to their

values. Instead, this Court recognized that Amendment 2 – like Section 21.06 here – was a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. at 635. Government "may not avoid the strictures of that Clause by deferring to the wishes or objections . . . of the body politic." *Cleburne*, 473 U.S. at 448.

Second, even if Texas's objective could somehow be characterized as independent of the classification, mere negative views about the disfavored group – "moral" or otherwise – are not a legitimate basis for legal discrimination. *Cleburne*, 473 U.S. at 448 ("mere negative attitudes . . . unsubstantiated by factors which are properly cognizable [by government] are not permissible bases" for discriminatory legal rules). This Court has many times repeated the core principle of rejecting bias, however characterized, in law: Legal distinctions may not give effect to the majority's desire to condemn an unpopular group, *see Moreno*, 413 U.S. at 534, the negative reactions of neighbors, *see Cleburne*, 473 U.S. at 448, the fears of people who are different, *see id.*, a reaction of discomfort toward a minority, *see O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *Cleburne*, 473 U.S. at 448-49, private prejudice, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), or any other manifestation of unfounded animosity toward one group, *Romer*, 517 U.S. at 633-35. History unquestionably teaches that the moral views of a given time, just like fears, dislikes, and blatant prejudices, often reflect prevailing negative attitudes about different groups of people in society. *Cf. Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Men feared witches and burnt women"). Indeed, negative attitudes toward a group can always be recast in terms of a discriminatory moral code. Using a moral lens to describe negative attitudes about a group that are not tied to any distinct, objective and permissible factors cannot cleanse those bare negative attitudes of their illegitimacy in government decisionmaking.

Texas's approach of dictating that same-sex couples are "more 'immoral and unacceptable,'" Pet. Opp. 18, than heterosexual couples under the very same circumstances – if they choose any

of the behaviors defined as "deviate sexual intercourse" – must be rejected as impermissible. *Neutral, evenhanded* laws that truly restrict all persons in the same way could, if there were no fundamental interests at stake, be justified by a moral position. Here, however, Texas impermissibly attempts to impose a *discriminatory* moral code.[26] The State's law and its proffered justification embody a bald preference for those with the most common sexual orientation and dislike of a smaller group who are different. Texas simply wants to judge those with a same-sex sexual orientation more harshly for the same behavior.[27]

The Constitution and this Court's precedents forbid that. In *Palmore*, a mother lost custody of her child because her interracial "'life-style'" was "'unacceptable . . . to society.'" 466 U.S. at 431 (quoting investigator's report). But this Court emphatically held that such negative views have no place in the law. *Id.* at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). Likewise, unequal treatment may not be based on archaic and unfounded negative attitudes toward a group, whether grounded in morality, religious conviction, or "nature." In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for example, the Court stressed the need to set aside archaic ideas about gender, such as that women are "innately inferior" or that unique "'moral and social problems'" would arise if women tended bar or otherwise enjoyed equal opportunities. *Id.* at 725 & n.10.

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[26] *See* Pet. App. 70a-71a (Anderson, J., dissenting) ("[E]qual protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. . . . The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression").

[27] This conclusion is reinforced by the fact that Texas's 1973 enactment discriminates against gay people whereas traditional morality did not. "[T]he practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized. . . . The issue here is . . . whether [sexual activity traditionally viewed as immoral] can be punished solely on the basis of sexual preference." *Jegley*, 80 S.W.3d at 352 (quotation marks omitted).

Similarly, negative attitudes toward those with a particular personal characteristic – even where advanced with the toned-down patina of morality – are also not a legitimate justification for discrimination under rational basis scrutiny. In *Romer*, the Court refused to endorse the dissent's position that Amendment 2's anti-gay classification could be sustained as an attempt "to preserve traditional sexual mores," *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). In *Moreno*, faced with a regulation that targeted the morally disfavored group of "hippies," the Court emphasized that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534. Instead, different treatment must be supported by "reference to [some independent] considerations in the public interest." *Id.* (alteration in original). Whether termed a moral judgment, fear, discomfort, or bias, "mere negative attitudes" about one subset of the diverse American population cannot justify distinctions in legal treatment. *See Cleburne*, 473 U.S. at 448.

Third, there is no other legitimate justification that can save this law. The distinction drawn by the Homosexual Conduct Law does not rationally further any permissible goal of the State. There are no valid concerns of the government here that correlate with sexual orientation, which is a deeply rooted personal characteristic that we all have. Variation among heterosexuals, homosexuals, and bisexuals has no "relevan[cy] to interests the State has the authority to implement," *Garrett*, 531 U.S. at 366, or to "factors which are properly cognizable," *Cleburne*, 473 U.S. at 448, in writing the criminal law. Thus, Section 21.06's line-drawing does not turn on or respond to any differences in maturity or age, in intent, or in the specifics of the actors' relationship, other than its same-sex or different-sex nature. It does not incorporate the use of force, a public location, or a commercial context in its elements, to address those types of important concerns. Indeed, Texas has other laws that criminalize sexual conduct that is non-consensual, or public, or commercial,

or with a minor. *See supra* at 6. Likewise, the law's discriminatory regulation of "deviate sexual intercourse" is unrelated to any interest in reproduction, for oral and anal sex are obviously not methods of reproduction for any couple.

Where government itself offers a reason that is illegitimate, as Texas has done here, or other factors indicate that the law rests on negative attitudes, the Court has carefully assessed any additional, purportedly rational and legitimate basis for challenged differential treatment. *See Cleburne*, 473 U.S. at 449-50 (careful assessment, and ultimate rejection, of other proffered reasons, where negative attitudes were clearly one basis for legal discrimination); *Moreno*, 413 U.S. at 535-38 (same). In such rational basis cases, the Court has not tried to supply new, "conceivable" reasons to support the classification. *See also Romer*, 517 U.S. at 635. It is, after all, only "*absent some reason to infer antipathy*" that the "Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted." *Vance v. Bradley* 440 U.S. 93, 97 (1979) (emphasis added). Here, Texas offers nothing more than the majority's negative moral judgment to support its discrimination, and that should end the matter with a ruling of unconstitutionality.

This 1970s classification is "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests." *Romer*, 517 U.S. at 635. It is solely an effort to mark a difference in status, to send a message in the criminal law that one group is condemned by the majority. This impermissible and irrational double standard must be removed from Texas's criminal code.

B. The Broader Realities Reinforce This Law's Affront to Core Principles of Equal Protection.

Additional considerations confirm the violation of equal protection here. First, the Homosexual Conduct Law does not just discriminate against gay and lesbian Texans in their private intimate relations, but brands gay persons as second-class citizens

and legitimizes discrimination against them in all aspects of life. Second, the discrimination worked by this law reflects and reinforces a century-long history of discrimination against gay Americans. The real-world context and history of discrimination further expose the law's illegitimacy. *See Romer*, 517 U.S. at 623-31 (considering in detail the functioning and historical background of challenged enactment); *Moreno*, 413 U.S. at 537 (considering "practical effect" of classification); *Eisenstadt*, 405 U.S. at 447-52 (considering social and legal backdrop in finding equal protection violation under rational basis standard). Where a law "circumscribe[s] a class of persons characterized by some unpopular trait or affiliation," there is a "special likelihood of bias on the part of the ruling majority." *N.Y. Trans. Auth. v. Beazer*, 440 U.S. 568, 593 (1979).

1. The Homosexual Conduct Law Brands Gay Persons As Second-Class Citizens and Licenses Wide-Ranging Discrimination Against Them.

On the surface, the Homosexual Conduct Law may appear to discriminate against gay men and lesbians in only one sphere of life – albeit a vitally important one, *see supra* Point I – by criminalizing the sexual intimacy of same-sex adult couples but not the very same conduct engaged in by different-sex couples. In reality, the scope of the discrimination is much broader. Today, sodomy laws – even facially evenhanded sodomy laws – are widely understood to brand gay citizens as criminals by virtue of their sexual orientation, and are thus used to legitimate across-the-board discrimination. Texas's enactment of a facially discriminatory law formalizes that pejorative classification of lesbians and gay men as second-class citizens.

Historically, the vast majority of consensual sodomy laws have not differentiated between same-sex and different-sex couples, and nine of the 13 sodomy laws still on the books today retain that traditional characteristic of being facially evenhanded. *See supra* at 6 & note 5, 21-22. In recent times, however, even facially non-discriminatory laws have been understood as targeting gay men and lesbians rather than heterosexual couples

who engage in identical forms of private sexual intimacy covered by the laws. This contemporary understanding of these laws was reflected in – and reinforced by – the Court's reasoning in *Bowers*, which read Georgia's facially *neutral* law as reflecting "the presumed belief of a majority of the electorate in Georgia that *homosexual* sodomy is immoral and unacceptable." 478 U.S. at 196 (emphasis added). *See generally* Nan D. Hunter, *Life After* Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 542 (1992).

Thus, in recent decades, the existence of facially nondiscriminatory sodomy laws – indeed, the mere power of state legislatures to pass such laws, whether or not that power is exercised – has been used to justify myriad forms of discrimination against gay and lesbian Americans as presumptive criminals. For example, sodomy laws are often invoked to deny or restrict gay parents' custody of or visitation with their own children,[28] to deny public employment to gay people,[29] and to block protection of gay citizens under hate-crime legislation.[30]

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[28] *See, e.g., Ex Parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (affirming imposition of severe visitation restrictions on lesbian mother, reasoning, "the conduct inherent in lesbianism is illegal in Alabama"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (removing child from lesbian mother and giving custody to child's grandmother, concluding, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody"); *see also Ex parte H.H.*, 830 So. 2d 21, 35 (Ala. 2002) (Moore, C.J., specially concurring) ("disfavoring practicing homosexuals in custody matters promotes the general welfare of the people of our State in accordance with our law").

[29] *See, e.g., Shahar v. Bowers*, 114 F.3d 1097, 1105 & n.17 (11th Cir. 1997); *see also Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (upholding public employment application question about homosexual relations "because the *Bowers* decision is controlling").

[30] An amendment to include "sexual orientation" in the Utah hate crime bill was defeated after a representative referred to Utah's sodomy law, stating that the "effect of granting special protection under [the hate crime act] to homosexuals would be contradictory under Utah law." *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 Utah L. Rev. 209, 222 (quotation marks omitted). Similarly, a hate crime bill in North Carolina covering sexual orientation was rejected in 2000 after the House

Indeed, the dissent in *Romer* argued that the Court's holding in *Bowers* alone was sufficient justification for the sweeping discrimination against gay citizens worked by Colorado Amendment 2, *Romer*, 517 U.S. at 640-43 (Scalia, J., dissenting) – even though Colorado's former sodomy law had applied to all and had been repealed years before, *see* 1971 Colo. Sess. Laws ch. 121.

Texas has gone further, abandoning any pretense of non-discriminatory legislation in this area by enacting a law that facially discriminates against gay and lesbian couples. By introducing that express classification into the criminal law, Texas has placed its imprimatur on discrimination based on sexual orientation. That has had far-reaching implications for gay citizens in virtually every area of their lives. As the State stipulated in an earlier challenge to Section 21.06, the law "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales*, 826 S.W.2d at 202-03; *see also Jegley*, 80 S.W.3d at 343 (under same-sex-only sodomy laws, gay people "suffer the brand of criminal impressed upon them by a[n] . . . unconstitutional law").

The Homosexual Conduct Law and similar statutes in other States have been routinely invoked to limit the custody or visitation that fit, gay parents would otherwise have with their own children.[31] Likewise, this law is cited as a basis for preventing

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heard testimony about the illegality of sodomy. People for the Am. Way Found., *Hostile Climate: Report on Anti-Gay Activity* 257 (2000).

[31] *See, e.g., Jegley*, 80 S.W.3d at 343 (observing that Arkansas sodomy statute had been used in harmful ways "outside the criminal context," including in prior case denying lesbian custody of her children); *see also* Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, Hous. Chron., June 27, 1994, at A11 (reporting that common tactic of vilifying gay parents in custody battle is "give[n] . . . teeth [by] Section 21.06"); *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (restricting gay father's visitation rights, in part because a "statute of this state declares that deviate sexual intercourse with another person of the same sex is illegal.

lesbians and gay men from serving as foster parents, simply because of their presumed "criminal status" and wholly apart from any inquiry into the best interests of children awaiting a home. *See, e.g.*, Polly Hughes, *Bill Would Ban Gay Texans From Adopting Children*, Hous. Chron., Dec. 11, 1998, at A38 (reporting on adoption and foster-care policies). Section 21.06 and other discriminatory consensual sodomy offenses have been used to interfere with equal employment opportunities for lesbians and gay men. *England*, 846 S.W.2d at 958; *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 144, 147-48 (N.D. Tex. 1981) (upholding denial of employment to gay man), *aff'd*, 669 F.2d 732 (5th Cir. 1982); *Baker*, 553 F. Supp. at 1130, 1147. These laws are also used to block the adoption of civil rights ordinances that would prohibit sexual orientation discrimination in employment and other core aspects of civil society.[32] The Homosexual Conduct Law has even been cited in arguments for imposing the death penalty on a gay defendant, *Burdine v. Johnson*, 66 F. Supp. 2d 854, 857 (S.D. Tex. 1999), *aff'd*, 262 F.3d 336 (5th Cir. 2001) (*en banc*), *cert. denied*, 122 S. Ct. 2347 (2002). In these many ways and others, the Homosexual Conduct Law is functioning as a legal reference point that endorses gay inequality.

Thus, even in the absence of actual arrest and prosecution, the Homosexual Conduct Law labels gay men and lesbians as criminals and legitimates discrimination against them on that basis.[33] Classification of gay Texans as second-class citizens is

§ 566.090.1"). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813 (2001).

[32] *See, e.g.*, Dianna Hunt, *Plan to Ban Anti-Gay Bias in Fort Worth Dies*, Dallas Morning News, Jan. 20, 1999, at 32A (local anti-discrimination measure in Texas abandoned after several members of town council expressed desire to wait until status of state's sodomy law was resolved); *see also* Arthur S. Leonard, *Legislative Notes*, 1998 Lesbian/Gay L. Notes 101, 115 (Kansas sodomy law cited in support of halting Topeka Human Rights Commission from investigating anti-gay discrimination).

[33] In Texas, calling someone a "homosexual" or using epithets that mean the same is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Thomas v. Bynum*, No. 04-02-

indeed the primary function of this law in society, as evidenced by the rarity of direct criminal enforcement. Texas makes no pretense of vigorously enforcing this law or of actually preventing any private, consensual adult sexual behavior. *Morales*, 826 S.W.2d at 203 ("The State concedes that it rarely, if ever, enforces § 21.06"). Only rare couples who are caught through some extremely unlucky series of events, like Lawrence and Garner in this case, ever directly suffer criminal prosecution and punishment for their discreet intimacy. *Model Penal Code* § 213.2 cmt. 2 ("To the extent ... that laws against deviate sexual behavior are enforced against private conduct between consenting adults, the result is episodic and capricious selection of an infinitesimal fraction of offenders for severe punishment"). The branding function of the Homosexual Conduct Law and the civil harms that follow from it forcefully underscore that the law violates equal protection. It "has the peculiar property of imposing a broad and undifferentiated disability on a single named group," *Romer*, 517 U.S. at 632, without rational and legitimate justification.

2. The Homosexual Conduct Law Reflects and Helps Fuel a Continuing History of Discrimination Against Gay Americans.

The Homosexual Conduct Law is only one manifestation of a history of irrational anti-gay discrimination.[34] Although our Nation has no legal tradition making the criminality of private sexuality turn on whether a couple is homosexual or heterosexual, *see supra* at 21-22, the laws of this Nation have reflected and played a role in virulent anti-gay discrimination over the last century. In enforcing the Equal Protection Clause today, this history informs the Court's assessment of whether a legal classification

00036-CV, 2002 WL 31829509, at *2 (Tex. App. Dec. 18, 2002); *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980).

[34] *See generally* Jonathan N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (rev. ed. 1992); John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (2d ed. 1997); *Hidden From History: Reclaiming the Gay and Lesbian Past* (Martin Duberman, Martha Vicinus & George Chauncey, Jr. eds., 1990); *Lesbians, Gay Men and the Law* (William B. Rubenstein ed., 1993).

that discriminates against those with a same-sex sexual orientation rests on irrational bias. *See Vance*, 440 U.S. at 97 (Court is attuned to "some reason to infer antipathy"); *see also, e.g., Romer*, 517 U.S. at 624-31.

Anti-gay discrimination was long justified by the false view that gay individuals were "sick." Until 1973, the year Section 21.06 was passed, homosexuality was incorrectly classified as a mental disease. *See supra* note 10; *see also Boutilier v. INS*, 387 U.S. 118 (1967) (holding that "psychopathic personality" exclusion in immigration law applied to homosexual persons). Deeming them to be "sex deviants," States involuntarily committed gay men and lesbians to mental institutions under extremely inhumane conditions. *See, e.g.*, James A. Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & Sexuality 1, 75-76 (2001). "Treatments" to "cure" homosexuality were often sadistically cruel. *See, e.g.*, Jonathan N. Katz, *Gay/Lesbian Almanac* 156 (1983) (describing "treatment" involving "repeated searing with a hot iron or chemical of [the] 'pervert' patient's loins"); Jonathan N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 129-208 (rev. ed. 1992). Even today, discredited "therapies" to "change" the very sexual orientation of gay adults continue this destructive pathologizing of gay citizens.[35]

The Homosexual Conduct Law is a remnant of a historical pattern of repressive law enforcement measures that have reinforced an outcast status for gay citizens. In the past, state laws authorized the arrest of individuals simply for "appearing" to be gay or lesbian, and the closure of businesses simply for serving gay patrons. *See, e.g., One Eleven Wines & Liqours, Inc. v. Division of Alcohol Beverage Control*, 235 A.2d 12, 14 (N.J. 1967) (reviewing and rejecting agency policy of suspending businesses' licenses simply for "permitting the congregation of apparent homosexuals"). McCarthy-era and later witch hunts led to the

[35] *See, e.g.*, American Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998), *available at* http://www.psych.org/archives/980020.pdf.

firing from federal and federal-contractor employment of thousands of persons suspected of being homosexuals. Katz, *Gay American History*, at 91-109; *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969).[36]

Official repression has often been directed at preventing gay Americans from organizing politically to advocate for and protect their rights. The earliest gay political organization in America, formed in Chicago in the mid-1920s, was silenced by police raids, arrests, and firings from employment. *See, e.g*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419, 438 & n.77 (2001). Similar groups that emerged after World War II also suffered severe harassment. *See, e.g., id.* at 443-48. Educational publications about homosexuality were censored as "obscene." *See, e.g., One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), *rev'd*, 355 U.S. 371 (1958) (per curiam).

Since the late 1960s and early 1970s, gay Americans have made substantial strides toward securing equal rights. *See supra* at 17-19, 30-31. But there is still substantial inequality and backlash. In passing a statute last year that protects against sexual-orientation discrimination, the New York state legislature found that anti-gay prejudice "has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering." N.Y. Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch. 2. Cruel anti-gay harassment in schools remains common. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). And violence motivated by irrational hatred of gay people can result in crimes of unimaginable brutality, as occurred with the murder of college student Matthew Shepard. *See, e.g., A Vicious Attack on Gay Student, Beaten, Burned and Left for Dead*, N.Y. Newsday, Oct. 10,

[36] Private institutions like Harvard University also mounted secret but systematic efforts to root out gay people. Amit R. Paley, *The Secret Court of 1920*, Harv. Crimson, Nov. 21, 2002, *available at* http://www.thecrimson.com/article.aspx?ref=255428 (accessed Jan. 14, 2003).

1998, at A4. Such killings, together with lesser forms of violence, intimidation, and discrimination, remain extremely effective in deterring gay Americans from revealing their sexual orientation, and thus from working openly to end anti-gay discrimination. By marking gay men and lesbians as criminals, discriminatory sodomy laws reinforce and intensify the irrational prejudice that leads to such violence. *See* Leslie, *Creating Criminals*, 35 Harv. C.R.-C.L. L. Rev. at 124.

The Constitution "neither knows nor tolerates classes among citizens." *Romer*, 517 U.S. at 623 (quotation marks omitted). In distinguishing laws based on hostility from ordinary legislative linedrawing, the Court should not ignore the persistent and destructive American history of anti-gay discrimination. The Homosexual Conduct Law is the State's own endorsement of discrimination against gay men and lesbians.

C. Equal Protection Concerns Are Particularly Strong Here Because of the Personal Burdens Imposed by This Criminal Law.

The Constitution's equal protection and due process protections are articulated together. U.S. Const. amend. XIV, § 1. Those dual safeguards reinforce one another, including in cases where liberty concerns may not rise to the level of a fundamental right or may be indirectly implicated. In this case, regardless of the Court's ultimate ruling on Point I, the personal burdens and restrictions on freedom imposed by Section 21.06 strengthen the need to reject its discriminatory classification.

On numerous occasions, the Court has held that where an extremely important personal interest is at stake, the State may *not* grant some citizens the ability to vindicate that interest but altogether deny other citizens that ability, even if the State *could* employ an evenhanded denial to all citizens. For example, there is no due process right to appellate review of decrees severing the parent-child bond. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). Where, however, the State grants review of such decrees to its citizens generally, it may not deny review to the few who cannot

pay costs. *Id.* at 107; *see also, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (although there is no right to obtain divorce, where State makes divorce available to most couples, it may not bar indigent persons from divorce due to inability to pay). That is so, even though wealth classifications are not inherently suspect, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and the imposition of costs on litigants is otherwise rationally related to a legitimate state interest, *M.L.B.*, 519 U.S. at 123. Because the imposition of costs in *M.L.B.* at least indirectly implicated "state controls or intrusions on family relationships," *id.* at 116, the Court closely examined the unique burden the State had placed on the poor and rejected it as offensive to the combined guarantees of equal protection and due process. *See id.* at 120. The constitutional challenge in this case is also of an especially serious order, because it "endeavor[s] to defend against the States's destruction of family bonds, and to resist the brand associated with" criminality that is now imposed only on the deeply personal and intimate sexual relations of gay adults. *Cf. id.* at 125. As in *M.L.B.*, the outcome here should "reflect both equal protection and due process concerns." *Id.* at 120.

Similarly, there is no fundamental right to an education, and undocumented aliens are not a suspect class, but in light of the importance of the interest in education in our society, a law barring undocumented aliens from receiving a state-funded education will be rigorously scrutinized. *Plyler v. Doe*, 457 U.S. 202, 216-24 (1982). The nature of the deprivation, though not a fundamental right, informs and strengthens the equal protection claim. As the Court reasoned in *Plyler*, exclusion of one isolated group from such an important sphere "poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221-22. It imposes a "stigma" that "will mark them for the rest of their lives." *Id.* at 223. Here, too, the Court must not ignore the stigma and the obstacle to equal advancement in society that accompanies the discriminatory law that Texas seeks to defend in assessing

its validity under the Equal Protection Clause. This classification likewise "involve[s] the State in the creation of permanent class distinctions" and relegates gay men and lesbians to "second-class social status." *Cf. id.* at 234 (Blackmun, J., concurring).

The Equal Protection Clause is a critical guardian of liberty as well as equality. It defends against unreasonable exactions by the State because it "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring); *accord Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). The Texas Homosexual Conduct Law makes a mockery of that principle. Just as the majority may not decide that the availability of divorce or education is critical for the majority itself but then deny those benefits to a few, so Texas may not determine that freedom from state intrusion into the private sexual intimacy of two consenting adults is an important aspect of liberty for most of its citizens, but then deny that liberty to a minority – particularly a minority historically subject to discrimination. Consensual sexual decisions are too clearly matters for individual decisionmaking, not for imposition by the State. The discriminatory criminal law at issue here seriously diminishes the personal relationships and legal standing of a distinct class, and under the Fourteenth Amendment cannot stand.

CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Appeals upholding Section 21.06 and affirming Petitioners' criminal convictions thereunder should be reversed.

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In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth District

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QUESTIONS PRESENTED

1. Whether the petitioners' criminal prosecutions for the offense of engaging in homosexual conduct, as defined by section 21.06 of the Texas Penal Code, violated the Fourteenth Amendment guarantee of equal protection of the law.

2. Whether the petitioners' criminal prosecutions under section 21.06 of the Texas Penal Code violated their constitutional rights to liberty and privacy, as protected by the Due Process Clause of the Fourteenth Amendment.

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled.

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STATEMENT

A citizen informed Harris County sheriff's deputies that an armed man was "going crazy" in the apartment of petitioner Lawrence. Pet. App. 129a. The investigating officers entered the apartment and observed the petitioners engaged in anal sexual intercourse. *Id.* They were then charged by complaint in a Harris County justice court with the commission of the Class C misdemeanor offense of engaging in homosexual conduct, an offense defined by TEX. PENAL CODE § 21.06(a) (Vernon 1994), as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[1] A Class C misdemeanor is punishable only by a fine not to exceed five hundred dollars. TEX. PENAL CODE § 12.23 (Vernon 1994).

After the petitioners were convicted and fined in the justice court,[2] they gave notice of appeal and the proceedings were transferred to Harris County Criminal Court at Law No. 10.[3] The petitioners moved to quash the complaints on various constitutional grounds. Pet. App. 117a, 130a. In support of those motions, the petitioners offered into evidence only the complaints themselves and the supporting "probable cause affidavits" filed by a sheriff's deputy in the justice court. *See* Pet. App. 129a, 141a. The two affidavits contained identical descriptions of the events leading to the filing of the complaints:

---

[1] The term "deviate sexual intercourse" is defined in the Texas Penal Code as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE § 21.01(1) (Vernon 1994).

[2] The record contains no information concerning the course of proceedings which occurred in the justice court.

[3] An appeal from a judgment of conviction in a Texas justice court results in a trial de novo in a county court. TEX. CODE CRIM. PROC. art. 45.042 (Vernon Supp. 2003).

> Officers dispatched to 794 Normandy # 833 reference to a weapons disturbance. The reportee advised dispatch a black male was going crazy in the apartment and he was armed with a gun.
>
> Officers met with the reportee who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

After the county court denied the petitioners' motions to quash the complaints, they entered pleas of *nolo contendere*, and the court found them guilty of engaging in homosexual conduct. The court sentenced each petitioner, pursuant to a plea bargain, to payment of a fine in the amount of two hundred dollars, and the petitioners again gave notice of appeal from their convictions.[4]

A three-judge panel of the Court of Appeals for the Fourteenth District of Texas initially held that the State's prosecution of the petitioners under section 21.06 violated the Equal Rights Amendment of the Texas Constitution,[5] with one justice dissenting. The State's motion for rehearing *en banc* was granted, however, and on March 15, 2001, the *en banc* court of appeals rejected all of the petitioners' constitutional challenges to the enforcement of section 21.06. *See Lawrence v. State*, 41 S.W.3d 349 (Tex. App.–Houston [14th Dist.] 2001, pet. ref'd) (Pet. App. 4a, *et seq.*). The *en banc* opinion of the court of appeals may be briefly summarized as follows:

[4] A case which has been appealed from a Texas justice court to a county court may be further appealed to a court of appeals if the fine exceeds $100 or the sole issue is the constitutionality of the statute on which the conviction is based. TEX. CODE CRIM. PROC. art. 4.03 (Vernon Supp. 2003).

[5] TEX. CONST. art. I, § 3a.

1. Enforcement of the statute prohibiting homosexual conduct does not violate the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 3, of the Texas Constitution, because the statute does not implicate fundamental rights or a suspect class, and it has a rational basis in the Texas Legislature's determination that homosexual sodomy is immoral. The fact that heterosexual sodomy is no longer a criminal offense under Texas law is not constitutionally significant, because the Legislature could rationally distinguish between an act performed with a person of the same sex and a similar act performed with a person of different sex. Pet. App. 13a-18a.

2. Enforcement of section 21.06 does not violate the Equal Rights Amendment of the Texas Constitution, because the statute applies equally to both men and women who engage in the prohibited conduct, and it is not the product of prejudice towards persons of either gender. Pet. App. 20a-24a.

3. The State's prosecution of the petitioners for the offense of engaging in homosexual conduct did not violate any constitutional right to privacy under the State or Federal Constitutions, in light of the long history of the imposition of criminal sanctions for such conduct, because it could not be said that the State of Texas or the United States recognized any "fundamental right" to engage in homosexual activity. Pet. App. 25a-31a.

A petition for discretionary review was denied, without written opinion, by the Texas Court of Criminal Appeals. Pet. App. 1a.

SUMMARY OF ARGUMENT

1. The record is inadequate to serve as a basis for recognition of a limited constitutional right to engage in extramarital sexual conduct, because the absence of information concerning the petitioners and the circumstances of their offense precludes a determination of whether they would actually benefit from the Court's recognition of the limited right which they assert. The record is also inadequate to establish that the petitioners belong to the class for which they seek equal protection relief.

2. The States of the Union have historically prohibited a wide variety of extramarital sexual conduct, a legal tradition which is utterly inconsistent with any recognition, at this point in time, of a constitutionally protected liberty interest in engaging in any form of sexual conduct with whomever one chooses. Nothing in this Court's "substantive due process" jurisprudence supports recognition of a constitutional right to engage in sexual misconduct outside the venerable institution of marriage. This Court should adhere to its previous holding on this issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and it should reaffirm that the personal liberties protected by the Due Process Clause of the Fourteenth Amendment from State regulation are limited to those "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

3. Since enforcement of the homosexual conduct statute does not interfere with the exercise of a fundamental right, and the statute is not based upon a suspect classification, it must only be rationally related to a permissible state goal in order to withstand equal protection challenge. This legislative proscription of one form of extramarital sexual misconduct is in keeping with long-standing national tradition, and bears a rational relationship to the worthy governmental goals of implementation of public morality and promotion of family values.

4. The petitioners cannot meet their burden of establishing a discriminatory purpose to the original enactment of a statute which is facially applicable to both persons of exclusively homosexual orientation and persons who regard themselves as bisexual or heterosexual. When the statute is viewed in historical perspective, it can reasonably be inferred that the Texas Legislature acted with non-discriminatory intent in limiting the scope of the predecessor sodomy statute to fit within the commonly understood parameters of this Court's then-emerging privacy jurisprudence.

ARGUMENT

I. Substantive Due Process Under The Fourteenth Amendment.

A. The appellate record is inadequate to support the recognition of the limited constitutional right asserted by the petitioners.

The appellate record does not establish that the petitioners would actually benefit from recognition of the particular liberty interest which they assert; therefore, it does not provide this Court with a factual basis for recognizing that interest.

Precise identification of an asserted liberty interest is critical to the determination of whether it falls within the scope of the Due Process Clause of the Fourteenth Amendment. An appellate court's substantive due process analysis "must begin with a careful description of the asserted right," because the "doctrine of judicial self-restraint" requires a court "to exercise the utmost care whenever [it] is asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

The petitioners initially advocate the recognition of a broadly drawn constitutional right to choose to engage in any "private consensual sexual intimacy with another

adult, including one of the same sex." Brief of Petitioners 10. However, the petitioners later clarify that their challenge does not extend to the validity of statutes prohibiting prostitution, incest or adultery, which they describe as implicating additional "state concerns" not present in this case. *Id.* at 22 n.16. In short, the petitioners are asking the Court to recognize a fundamental right of an adult to engage in private, non-commercial, consensual sex with an unrelated, unmarried adult.

The slim record reveals only that the petitioners are adult males and that they engaged in anal intercourse in an apartment that petitioner Lawrence identified as his residence. It does not answer any of the following questions concerning the factual basis of their constitutional claims:

- Whether the petitioners' sexual conduct was non-commercial.[6]
- Whether the petitioners' sexual conduct was mutually consensual.[7]
- Whether the petitioners' conduct was "private."[8]

[6] The lack of profit motivation cannot be inferred from the lack of prosecution for the more serious offense of prostitution, *see* TEX. PENAL CODE § 43.02 (Vernon Supp. 2003), because the police could not possibly determine whether prostitution was occurring if both participants in the sexual conduct declined to discuss that issue.

[7] While neither of the petitioners was charged with any variant of sexual assault, prosecution for such an offense would require an acknowledgment from at least one of the parties that the sexual activity was non-consensual. Because there are any number of reasons why a person might choose not to cooperate with authorities in the investigation and prosecution of a sexual offense, mutual consent cannot necessarily be inferred from the parties' silence.

[8] While the record reflects that the sexual conduct occurred in Lawrence's apartment, the record does not indicate whether anyone else was present in that apartment at the time. Lower courts have held that any right of privacy that protects marital sex from governmental interference is waived when an onlooker is welcomed into the marital

(Continued on following page)

- Whether the petitioners are related to one another.
- Whether either of the petitioners is married.
- Whether either (or both) of the petitioners is exclusively homosexual.[9]

While the petitioners possess standing to challenge the constitutionality of a statute under which they have actually been prosecuted and convicted, *see Eisenstadt v. Baird*, 405 U.S. 438, 443-444 (1972), they should not be permitted to argue that a protected liberty interest exists under some specified set of circumstances without showing that those circumstances actually exist. This Court will not issue an opinion "advising what the law would be upon a hypothetical state of facts," and it will not "decide questions that cannot affect the rights of litigants in the case before [it]." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (citations omitted). For example, in cases not involving expressive activity protected by the First Amendment, litigants have no standing to argue that a statute "would be unconstitutional if applied to third parties in hypothetical situations." *County Court of Ulster County v. Allen*, 442 U.S. 140, 155 (1979).[10]

bedchamber. *See Lovisi v. Slayton*, 539 F.2d 349, 351-352 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977).

[9] The sexual orientation of the petitioners appears to be irrelevant to the disposition of their substantive due process argument, because they assert a constitutional right to engage in sodomy with persons of either gender, but it may be significant in determining whether the petitioners are members of any specific class in addressing their arguments premised upon the Equal Protection Clause, *infra*.

[10] Thus, in *United States v. Lemons*, 697 F.2d 832, 834-835 (9th Cir. 1983), in which the defendant was convicted of engaging in homosexual sodomy in violation of an Arkansas statute, the court of appeals held that the defendant would not be heard to argue that the statute would be unconstitutional if applied to persons who committed sodomy in a private place, in light of the fact that the defendant was arrested while engaging in an act of oral sex in a public place, *i.e.*, the restroom of a national park.

In recognizing constitutional liberty interests under the Fourteenth Amendment, appellate courts "must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." *Troxel v. Granville*, 530 U.S. 57, 95-96 (2000) (Kennedy, J., dissenting).

Simply put, the record in this case provides an insufficient foundation for the meaningful review of the important and complex question of whether there is a constitutional right to engage in private, non-commercial, consensual sex with an unrelated, unmarried adult. At best, the record would support only the recognition of an extremely broad right to engage in sexual conduct with any other adult, regardless of any other circumstance which might attend that conduct – a right so broad that the petitioners themselves disavow any claim to it.

Because the record is inadequate to permit this Court to scrutinize and identify the contours and limitations of any protected liberty interest that might be recognized in this case, the State respectfully suggests that this Court dismiss the petition for writ of certiorari as improvidently granted. In the alternative, the respondent asks that the Court affirm the judgment of the Texas court of appeals on ground that the record is inadequate to support an effort to identify a limited constitutional right to engage in sexual conduct.

B. The Court has adopted an historical approach to the recognition of liberty interests protected under the Due Process Clause.

In addressing claims that a state has interfered with an individual's exercise of a previously unrecognized liberty interest protected by the Fourteenth Amendment, this Court has looked to the nation's history and legal traditions to determine whether the asserted interest is

actually so fundamental to our system of ordered liberty as to merit constitutional protection from state regulation. For instance, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1976) (plurality opinion), the Court observed that, "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teaching of history [and], solid recognition of the basic values that underlie our society'." *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)). Thus the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.*

In *Bowers*, 478 U.S. at 192-194, the Court rejected an asserted fundamental right to engage in homosexual conduct because, in light of pervasive State criminalization of such conduct throughout the nation's history, it could not seriously be asserted that a right to engage in homosexual sodomy was "deeply rooted in this Nation's history and tradition." Three years later, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), the Court noted that in its attempts to "limit and guide interpretation of the [Due Process] Clause," it has "insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that in isolation is hard to objectify), but also that it be an interest traditionally protected by our society." *Id.* at 122-123.

Two of the opinions issued in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), expressed doubt or disagreement that the Due Process Clause protects only those practices, "defined at the most specific level," which were protected by law at the time of ratification of the Fourteenth Amendment.[11] Emphasis upon the

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[11] *See Casey*, 505 U.S. at 847 (joint opinion of O'Connor, J., Kennedy, J., and Souter, J.); *id.* at 923 (Blackmun, J., concurring).

nation's legal traditions appeared only in the dissenting opinions.[12] However, less than a year later, the Court's opinion in *Reno v. Flores*, 507 U.S. 292 (1993), unambiguously stated that the "mere novelty" of a claimed constitutional liberty interest was "reason enough to doubt that 'substantive due process' sustains it," because it could not be considered "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 303 (quoting *United States v. Salerno*, 481 U.S. 739, 751 (1987), and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

This issue of the importance of national legal tradition in substantive due process jurisprudence was resolved in *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which the Court emphasized the necessity of "examining our Nation's history, legal traditions, and practices" in order to determine whether a claimed liberty interest was, "objectively, 'deeply rooted in this Nation's history and tradition'" and "implicit in the concept of ordered liberty," and, therefore, merited protection under the Fourteenth Amendment:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. City of East Cleveland*], at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v.*

[12] *See Casey*, 505 U.S. at 952-953 (Rehnquist, C.J., dissenting); *id.* at 980 (Scalia, J., dissenting).

> *Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores, supra*, at 302; *Collins* [*v. Harker Heights*, 503 U.S. 115 (1992)] at 125; *Cruzan* [*v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)] at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins, supra*, at 125, that direct and restrain our exposition of the Due Process Clause.

521 U.S. at 720-721.

The Court declined to recognize the constitutional liberty interest proposed in *Glucksberg* – a right to assisted suicide – because its recognition would have required the Court to "reverse centuries of legal doctrine and practice" and to elevate to the status of a protected liberty interest a practice that was traditionally prohibited by state law. *Id.* at 723, 728. In addition to the opinion of the Court, Justice Stevens in a concurring opinion agreed that "[h]istory and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide." *Id.* at 740 (Stevens, J., concurring).[13]

Since *Glucksberg* was decided, the Court has had little opportunity to consider the recognition of previously unacknowledged liberty interests under the Due Process

[13] The "traditionalistic approach" adopted by the Court in *Glucksberg* has been described as "wise, workable, and firmly grounded in principles of American constitutionalism," in that it "provides a check against particular states or local jurisdictions whose practices contradict what most Americans would deem to be fundamental rights, but does so without licensing courts to second-guess democratic judgments on the basis of their own ideological or philosophical preferences." Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 681 (1997).

Clause.[14] In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court held that a determination of whether executive action violated an individual's right to substantive due process did not require the same historical and traditional analysis utilized in reviewing legislative action. A concurring justice suggested that "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry," leaving room for an "objective assessment of the necessities of law enforcement"; but that opinion did not suggest that *Glucksberg* was incorrect in its emphasis upon American legal tradition in determining the existence of a substantive due process right in the context of review of a legislative enactment. *Id.* at 857-858 (Kennedy, J., concurring). A subsequent statement in the same concurring opinion that "objective considerations, including history and precedent, are the controlling principle, regardless of whether the State's action is legislative or executive in character," *id.* at 858 (Kennedy, J., concurring), indicated no disagreement with the basic principle expressed in *Glucksberg*: that recognition of protected liberty interests under the Fourteenth Amendment must be based upon objective historical evidence that a particular practice is a cherished American tradition, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court." *Glucksberg*, 521 U.S. at 720.

[14] The Court's opinions in *City of Chicago v. Morales*, 527 U.S. 41 (1999), and *Troxel v. Granville*, 530 U.S. 57 (2000), both included acknowledgement of the existence of substantive rights under the Due Process Clause, but in each of those cases the particular liberty interest in question had long been recognized by the Court: the freedom to loiter in a public place, *see Morales*, 527 U.S. at 53-54; and parents' liberty interest in the care, custody and control of their own children, *see Troxel*, 530 U.S. at 65-66.

C. This nation has no deep-rooted tradition of protecting a right to engage in sodomy.

Turning to the question of whether a right to engage in sodomy is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," the Court's previous resolution of that issue in *Bowers v. Hardwick* is unassailable. As noted in *Bowers*, sodomy was a serious criminal offense at common law;[15] it was forbidden by the laws of the original thirteen states at the time of the ratification of the Bill of Rights; and it was punishable as a crime in all but five of the thirty-seven states in existence at the time of the ratification of the Fourteenth Amendment. *Bowers*, 478 U.S. at 192-193.

As further noted in *Bowers*, sodomy remained punishable as a crime in every state of the Union prior to the year 1961, *id.* at 193, when Illinois became the first state to adopt the American Law Institute's Model Penal Code approach to decriminalization of some sexual offenses. *Id.* at 193 n.7.

Our nation's history has not been rewritten in the seventeen years since *Bowers* was decided, and that history contradicts any assertion that a right to engage in homosexual anal intercourse has been a valued and protected right of American citizens. The fact that the states have traditionally prohibited the act as a crime is utterly inconsistent with any claim that our legal tradition has treated the choice to engage in that act as a "fundamental" right.

It is true that some change has occurred since *Bowers* was decided: three more states and the District of Columbia, in appropriate exercise of the democratic process, have repealed or limited the scope of their statutes prohibiting sodomy in general or homosexual sodomy in particular;

[15] *See also* William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 157 (1999).

and a small number of state appellate courts have found that such statutes violate a state constitutional right to privacy. *See* Brief of Petitioners 23 n.17. The State of Texas is now one of thirteen states in which consensual homosexual sodomy remains a criminal offense. *Id.* at 27 n.21. The fact that several states have ceased treating sodomy as a criminal offense, however, is no evidence of a national tradition of espousing, honoring or safeguarding a right to engage in deviate sexual intercourse.

The petitioners concede that this Court requires "objective guideposts," such as "history and precedent," in the process of identification of liberty interests protected by the Fourteenth Amendment. They point to the gradual trend towards decriminalization of consensual sexual behavior among adults as the necessary objective evidence of a fundamental right firmly rooted in the traditions and conscience of American citizens. *See* Brief of Petitioners 19-25. Four decades of gradual but incomplete decriminalization does not erase a history of one hundred and fifty years of universal reprobation. A recent trend towards uneasy toleration – even a trend involving a majority of the fifty states – cannot establish a tradition "deeply rooted" in our national history and tradition. The petitioners mistake new growth for deep roots.

The petitioners argue that the "consistency of the direction of change" indicates a national consensus sufficient to satisfy the need for objective indicia in identifying a constitutionally protected liberty interest, utilizing a key phrase from the Court's recent decision in *Atkins v. Virginia*, 122 S.Ct. 2242, 2249 (2002), in which the Court found that the execution of mentally retarded criminal defendants violated the Eighth Amendment.

The petitioners' argument suffers from a logical flaw in that, prior to 1961, every State treated sodomy as a criminal offense, so only one direction of change is possible. *Compare Atkins,* 122 S.Ct. at 2263 (Scalia, J., dissenting). A State's affirmative choice to maintain the status quo demonstrates the *absence* of consensus. Several states

have made such a choice, in that their appellate courts have upheld the constitutionality of statutes prohibiting the commission of sodomy or homosexual conduct. For instance, the Louisiana Supreme Court held in *State v. Smith*, 766 So.2d 501, 508-510 (La. 2000), that the constitutional right to privacy expressly recognized by that state's constitution did not extend to the commission of oral or anal sex in private, observing that there "has never been any doubt that the legislature, in the exercise of its police power, has the authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral."[16] *Accord Missouri v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (holding that a prosecution under the Missouri homosexual conduct statute did not violate any constitutional right to privacy under the state or federal constitution). Should just a few more states join Texas, Louisiana and Missouri in upholding the state's power to punish acts of sodomy, one could argue that the prevailing trend was actually the rejection of a constitutional privacy right extending to consensual sodomy.

In any event, currently evolving standards are an unstable basis for recognition of fundamental rights protected by the Fourteenth Amendment. The Eighth Amendment has long been construed to require consideration of "evolving standards of decency that mark the

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[16] The Louisiana court also held that the separation of powers provision of its state constitution precluded the Court from usurping the legislative function of determining "the public policy of Louisiana on the practice of oral and anal sex"; and it pungently observed that the "only perceptible unconstitutionality in this case is that which would be evident if this court would . . . elevate [its] own personal notions of individual liberty over the collective wisdom of the voters' elected representatives' belief" that the proscription of "oral and anal sex, consensual or otherwise, is in furtherance of the moral welfare of the public mind." *Smith*, 766 So.2d at 510.

progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), permitting reliance upon "contemporary values" as evidenced by recent legislative enactments. *See Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). In contrast, none of this Court's precedents so much as suggests that recent legislative activity should be accepted as proof of "deeply rooted" fundamental rights, and the Court's decisions exploring the possible existence of unrecognized liberty interests under the Fourteenth Amendment have never taken into account rapidly "evolving standards." The approach advocated by the petitioners would require this Court to serve as a micro-managing super-legislature, continually assessing current legislative trends to determine the current extent of protection under the Fourteenth Amendment – an approach which is entirely inconsistent with the Court's reliance in *Glucksberg* upon history and legal tradition.

The petitioners also argue that previously recognized "fundamental interests . . . converge in the right asserted here," Brief of Petitioners 11-16, but considered separately, the recognized liberty interests upon which the petitioners rely do not implicate the conduct in question, and no logical process extends their reach when they are lumped together.

The petitioners first assert a constitutionally protected right to choose to enter into "intimate relationships," citing *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984), but no court has held that this nebulously defined right extended to the protection of sexual misconduct prohibited by State law. For example, in *Marcum v. McWhorter*, 308 F.3d 635, 641-643 (6th Cir. 2002), the court held that the freedom to choose to enter into personal relationships could not extend to an adulterous relationship, since adultery has been punishable as a crime for centuries. In this case, while the petitioners may have a constitutional right to associate with one another, the right to form an "intimate relationship" does not

protect any and all sexual conduct in which they might engage in the context of that relationship.[17]

The petitioners also rely upon the recognized constitutional right to "bodily integrity," but the Court's decisions regarding bodily integrity generally pertain to unwarranted government invasion of an individual's body, and the individual's right to control his own medical treatment, *see Glucksberg*, 521 U.S. at 777-778 (Souter, J., concurring), and those decisions have nothing to do with the manner in which an individual interacts with third parties or invades another person's body.

The right to privacy in the home has long been recognized under both the First Amendment, *see Stanley v. Georgia*, 394 U.S. 557, 564-565 (1969), and the Fourth Amendment, *see Kyllo v. United States*, 533 U.S. 27, 31 (2001). However, the decision in *Stanley* involved the individual's freedom of thought, rather than conduct, *Stanley*, 394 U.S. at 565-566, and that decision has never been extended to prohibit state regulation of conduct that does not involve expression protected by the First Amendment. The Fourth Amendment protects against unreasonable police entry and search of the home, but it has never been found to protect one from prosecution for otherwise criminal conduct that occurs within that home.[18] *See Osborne v. Ohio*, 495 U.S. 103, 108-110 (1990); *Bowers*, 478 U.S. at 195-196; *Stanley*, 394 U.S. at 568 n.11.

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[17] Parents might well have a constitutionally protected right to maintain an intimate relationship with their children, but no one would argue that their protected liberty interest would extend to having sexual relations with the children.

[18] The petitioners understandably disavow any complaint regarding the manner in which the police entered Lawrence's apartment, Brief of Petitioners 14-15, since few citizens would want to impede an officer's ability to enter their residence to search for an armed man said to be "going crazy" on the premises. Pet. App. 129a.

By arguing that their asserted liberty interest under the Fourteenth Amendment may be located at the "convergence" of these previously recognized rights, the petitioners implicitly admit that none of them, standing alone, has ever been construed in a fashion that would protect an individual from state prosecution for sexual misconduct occurring in a private residence. The petitioners' assertion of a patchwork of constitutional rights which do *not* implicate their conduct does not logically prove that the conduct is in fact protected by a previously unrecognized liberty interest.

D. No tradition of protection exists at any level of specificity of designation of an asserted liberty interest.

The petitioners' other quarrel with *Bowers* involves the level of specificity at which the nation's traditions are to be analyzed in assessing the existence of a protected liberty interest under the Fourteenth Amendment, an issue that does not seem to have been definitively resolved at this time. *See Michael H.*, 491 U.S. 110, 127 n.6 (plurality opinion), 132 (O'Connor, J., concurring); *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).[19] Assuming that issue does remain open at this time, it should not be necessary to resolve it in this case, since the petitioners cannot establish a historical tradition of exalting and protecting the conduct for which they were prosecuted at *any* level of specificity.

[19] The opinion in *Lewis* noted: "*Glucksberg* presented a disagreement about the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment. The differences of opinion turned on the issues of how much history indicating recognition of the asserted right, viewed at what level of specificity, is necessary to support the finding of a substantive due process right entitled to prevail over state legislation." *Id.*

At the most specific level, the nation has a long-standing tradition, only recently waning, of criminalizing anal sodomy – the offense once known as "buggery" – as a serious criminal offense. *See Bowers*, 478 U.S. 192-194; William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 157-158, 328-337 (App. A) (1999).[20]

But even if the topic is broadened to include other acts of extramarital sexual intercourse, such as fornication, adultery, incest, prostitution, etc., the nation's tradition is still one characterized by prohibition and criminalization. Most of the states have maintained, through most of their history, statutes which made it a criminal offense to engage in fornication and adultery as well as sodomy, and there is no long-standing tradition of protecting the right to engage in any sort of extramarital sexual conduct.

Fornication was a punishable offense in colonial times, and it remained illegal in forty states until the early 1970s. *See* Tracy Shallbettor Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 Wash. L. Rev. 767, 780 (1998). As of 1998, it was still a crime in thirteen states and the District of Columbia. *See id.* at 767 n.2; *accord*, Richard Green, *Griswold's Legacy: Fornication and Adultery as Crimes*, 16 Ohio N.U.L. Rev. 545, 546 n.8 (1989).

Adultery was once a capital offense, under some circumstances, in colonial Massachusetts, and it was

[20] While acknowledging the widespread and longstanding existence of sodomy statutes, Professor Eskridge is critical of the historical basis for the Court's decision in *Bowers*, on grounds that early sodomy statutes were aimed primarily at the prohibition of buggery and similar forms of unnatural coitus, rather than the oral sex act for which the defendant in *Bowers* was prosecuted. *See* Eskridge at 156-157. That concern is absent in this case, since it is undisputed that the act of anal sodomy was a serious crime – originally a capital offense – from the earliest days of the colonization period.

punished as a crime during the colonial period in almost every jurisdiction. *See Oliverson v. West Valley City*, 875 F. Supp. 1465, 1474 (D. Utah 1995). Adultery was still punishable as a crime "in most states . . . in 1900," *see id.* (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 13 (1993)), and as of 1996, it remained a crime in twenty-five states and the District of Columbia. *City of Sherman v. Henry*, 928 S.W.2d 464, 470 n.3 (Tex. 1996); Green, *supra* at n.7.

Thus, the legislatures of the various states have shown significant concern for the sexual morality of the citizenry, and statutes criminalizing extramarital sexual conduct have been pervasive throughout our national history. The constitutionality of those statutes previously has been thought to be "beyond doubt," *Griswold v. Connecticut*, 381 U.S. 479, 498 (Goldberg, J. concurring), and recent decisions from the lower courts have held that the statutes are, in fact, constitutional. *See, e.g., Henry*, 928 S.W.2d at 471-472; *Marcum*, 308 F.3d at 642-643.

Furthermore, criminal prosecutions aside, the United States had no history whatsoever of *protecting* the right to engage in extramarital sex, at least until a few state appellate courts began in the 1990s to invalidate their sodomy statutes as violative of a state constitutional right to privacy.[21] This Court, in particular, has never recognized

[21] The handful of state appellate courts that have invalidated sodomy or homosexual conduct statutes have all predicated their holdings upon objective indications that their state constitutions provided more privacy protection than the Federal Constitution. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) (basing its ruling upon the "textual and structural differences between the United States Bill of Rights and our own, which suggest a different conclusion from that reached by the United States Supreme Court is more appropriate"); *Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996) (noting that both the "Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more

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any right to engage in extramarital sexual conduct, and it is telling that most of the fundamental liberty interests the Court has recognized under the Fourteenth Amendment are rooted in marriage, procreation and childrearing. An asserted right to engage in homosexual sodomy is actually inimical to the fundamental rights that this Court has endeavored to protect.

The Court catalogued the liberty interests to which it has accorded Fourteenth Amendment protection in *Glucksberg*, 521 U.S. at 720, as follows:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy,

extensive than the corresponding right to privacy provided by the Federal Constitution"); *Gryczan v. State*, 942 P.2d 112, 121-22 (Mont. 1997) (invalidating a statute prohibiting "deviate sexual conduct" and noting that "Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution"); *Powell v. State*, 510 S.E.2d 18, 22 (Ga. 1998) (in which a general sodomy statute was invalidated upon a finding that the " 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution"); *Jegley v. Picado*, 80 S.W.3d 332, 344 (Ark. 2002) (stating that "Arkansas's Constitution can be held to provide greater privacy rights than the United States Constitution").

The fact that five state courts have invalidated sodomy statutes in the last eleven years, on state constitutional grounds, is meager evidence of a deeply rooted national tradition of protecting the privacy of the conduct in issue. Too few states have taken such a step, over too brief a period of time, to support any such inference.

> *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278-279.

The conduct at issue in this case has nothing to do with marriage or conception or parenthood and it is not on a par with those sacred choices. Homosexual sodomy cannot occur within or lead to a marital relationship. It has nothing to do with families or children. The decision to engage in homosexual acts is not like the acts and decisions that this Court previously has found worthy of constitutional protection, and it should not be added to the list of fundamental rights protected by the Fourteenth Amendment.

The difference between protected conduct within the marriage relationship and unprotected sexual conduct outside marriage has been recognized on a number of occasions, most famously in Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 545-546, 552-553 (1961), in which he expressed the view that "any Constitutional doctrine in this area" must be built upon the division between acts occurring within and without the marital relationship:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it

> necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. . . .
>
> The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. *See* 367 U.S. at pages 545-548, *supra*. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes

to regulate by means of the criminal law the details of that intimacy.

As noted in a concurring opinion in *Glucksberg*, Justice Harlan's proposed dichotomy "provides a lesson for today," in that his identification of the traditionally protected liberty interest in *Poe v. Ullman* served to distinguish "between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies) and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions." 521 U.S. at 770-772 (Souter, J., concurring).

Therefore, should the Court consider expanding the level of specificity with which it identifies the proposed liberty interest at issue in this case, the State urges the Court to draw the line at the threshold of the marital bedroom, in keeping with its past decisions emphasizing the American tradition of marital privacy. Outside that threshold, nothing in our nation's "history, legal traditions, and practices" offer the "crucial 'guideposts for responsible decisionmaking' . . . that direct and restrain [the Court's] exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

E. Principles of stare decisis counsel against recognition of a new protected liberty interest.

Stare decisis mandates that the Court adhere to its holdings in *Bowers*. Seventeen years should be considered a very brief period indeed, in the context of the development of fundamental rights under the Fourteenth Amendment, and the principle of stare decisis counsels against rapid change in this area. If a right is truly fundamental, its public acceptance and societal value should not be the subject of vehement and widespread disagreement. Fundamental rights should be rock solid, and vacillation is

inconsistent with the level of durability of rights which should be deemed "fundamental" to our society.

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The petitioners argue that such special justification exists in the steady "erosion" of support for *Bowers* and the concomitant advancement of the gay rights movement, Brief of Petitioners 30-31, but the Court reaffirmed in *Glucksberg* that *Bowers* utilized the correct mode of analysis in the determination of the existence of a new liberty interest under the Fourteenth Amendment. The fact that a few more states have eased criminal sanctions on sodomy or homosexual conduct since 1986 does not logically affect the validity of the conclusion in *Bowers* that no right to engage in homosexual conduct can be found "deeply rooted in this Nation's history and tradition." *Bowers*, 478 U.S. at 192.

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The principle of federalism that encourages the state to undertake such experiments also operates to permit states to decline to participate in them. All change is not for the better, and the right to be first should be accompanied by a right to be among the last to accept a change of debatable social value.

In *Atkins*, the State of Texas found itself in a minority of states which had not legislatively limited its capital punishment statutes in a particular fashion, and it was obligated to join the herd because of the Eighth Amendment requirement that it comply with "evolving standards" of "contemporary values." 122 S.Ct. at 2247. This is not an Eighth Amendment case, and any indicia of recent "evolving standards" is irrelevant to the identification of those truly fundamental rights which form the core of our

democratic society. Courts cannot concern themselves "with cultural trends and political movements" without "usurping the role of the Legislature," and while the Legislature "may not be infallible in its moral and ethical judgments, it alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good." *Lawrence*, 41 S.W.2d at 362.

For these reasons, this Court should reject the petitioners' due process challenge and affirm the judgment of the court below.

II. Equal Protection Under the Fourteenth Amendment.

The petitioners also argue that their prosecution for engaging in homosexual conduct violates the Equal Protection Clause of the Fourteenth Amendment. They argue that section 21.06 improperly criminalizes sexual conduct with a person of the same sex that is otherwise legal when done with a person of the opposite sex, and they claim that the State cannot articulate any rational basis for this classification.

This challenge fails on two grounds. First, given the evolution of the Texas sodomy statute towards more liberality with respect to sexual activity, petitioners cannot establish that the Texas Legislature purposefully discriminated against persons engaging in homosexual conduct. Instead, this Court reasonably can infer that the legislature, in good faith, incrementally narrowed the State's neutral proscriptions against sodomy in accordance with contemporaneous developments in due process jurisprudence. As such, instead of being the product of a legislative choice to discriminate against homosexuals, section 21.06 is the vestigial remainder of a predecessor sodomy statute, reduced to its present form as a result of the legislature's 1973 reform of the Texas Penal Code.

Second, this Court can infer a rational basis for the legislature's enactment of section 21.06. The State of Texas

has a legitimate state interest in legislatively expressing the long-standing moral traditions of the State against homosexual conduct, and in discouraging its citizens – whether they be homosexual, bisexual or heterosexual – from choosing to engage in what is still perceived to be immoral conduct. Section 21.06 rationally furthers that goal by publishing the State's moral disapproval in a penal code of conduct for its citizens and by creating a disincentive against the conduct. The Legislature reasonably could have concluded that lesser, unenforceable expressions of disapproval would be ineffective to deter that conduct. Moreover, the narrowing of the predecessor sodomy statute to avoid constitutional challenge is in itself a rational basis for the legislative action: viewed in historical context, the Texas Legislature's decision was a reasonable response to the evolving due process jurisprudence of the late 1960s and early 1970s.

This rational-basis analysis is consistent with this Court's analysis in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which addressed the rationality of basing legislation on moral tradition. Although *Bowers* was decided on substantive due process grounds, it stands alone as the only modern case in which this Court has approved moral tradition as a submitted rational basis for legislation. Nothing has changed in the sixteen years since *Bowers* to justify abandonment of its conclusion.[22]

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[22] As discussed in more detail *infra*, *Romer v. Evans*, 517 U.S. 620 (1996), does not dictate otherwise. Instead, *Romer* is notable for what it does *not* do: in striking down a constitutional amendment remarkably overbroad for the purposes it purported to further, the majority's opinion pointedly neither revisited the rationality of moral classifications in legislation nor distinguished *Bowers*.

A. The Equal Protection Clause – standard of review.

The Equal Protection Clause of the Fourteenth Amendment creates no substantive rights. *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Instead, it "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Id.*; *see also City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (construing Equal Protection Clause as "essentially a direction that all persons similarly situated should be treated alike").

Unless a classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

1. Rational-basis review.

Rational-basis review is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin,* 490 U.S. 19, 26 (1989). "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11 (citations omitted); *see also Romer,* 517 U.S. at 632 (1996) ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.")

The rational-basis standard of review is a paradigm of judicial restraint. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). Rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices, nor does it authorize the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). The Court summarized the evidentiary presumptions in rational-basis review in *Heller* as follows:

> [A] legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Id. at 320-21 (citations omitted).

When social legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes. *Cleburne*, 473 U.S. at 440; *see also Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (holding that the rational basis standard "is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose

upon the States their views of what constitutes wise economic or social policy").

2. Heightened review is neither sought nor required.

The petitioners suggest only in a footnote that laws which incorporate a sexual-orientation-based classification, or a gender-based classification to discriminate against homosexuals, should be reviewed pursuant to a heightened scrutiny standard. Brief of Petitioners 32 n.24. This assertion is not implicated by the litigation, briefed by the petitioners, or mandated by law.

The petitioners do not brief their request for heightened review and continue to rely solely on the rational-basis standard of review in their equal protection challenge to the constitutionality of section 21.06. *See Lawrence,* 41 S.W.2d at 378 (Anderson, J., dissenting) (in response to majority's conclusions that there is no fundamental right to engage in sodomy, and homosexuals do not constitute a suspect class, dissent characterizes these conclusions as "irrelevant here because *appellants do not raise these arguments*") (emphasis added). Accordingly, this Court's jurisprudence would be ill-served by consideration of a new standard not actually in controversy between the parties. *See Heller*, 509 U.S. at 319 ("Even if respondents were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.").

The appropriateness of applying a rational-basis analysis to classifications based upon sexual orientation is not a matter of controversy in this Court or the federal

courts of appeals. In *Romer v. Evans*, 517 U.S. 620 (1996), a case in which the amendment in question specifically classified the affected individuals in terms of sexual orientation, this Court nonetheless utilized the rational-basis test. *Id.* at 631-636. Likewise, in the federal courts of appeals, the profusion of litigation involving the exclusion of homosexuals from military service has provided ample opportunity for consideration of the appropriate standard of review, and it appears that those courts are unanimous in finding that homosexuals do not constitute a suspect class and that there is no fundamental right to engage in homosexual conduct.[23]

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[23] *See, e.g., Thomasson v. Perry,* 80 F.3d 915, 928 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996) ("rational basis is . . . the suitable standard for review" of the military "don't ask/don't tell" policy); *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986) ("the standard for review is whether § 21.06 [of the Texas Penal Code] is rationally related to a legitimate state end"); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289, 292-293 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (holding that city charter amendment pertaining to sexual orientation was subject to review "under the most common and least rigorous equal protection norm . . . the 'rational relationship' test"); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) ("deferential standard of review" held applicable to military regulation targeting homosexuals).

See also Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996), *cert. denied sub nom. Richenberg v. Cohen*, 522 U.S. 807 (1997) (rejecting contention that homosexuality is "suspect classification" requiring heightened scrutiny); *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1998) ("because homosexuals do not constitute a suspect or quasi-suspect class," the military "don't ask/don't tell" policy is subject only "to rational basis review"); *Rich v. Secretary of the Army,* 735 F.2d 1220, 1229 (10th Cir. 1984) ("classification based on one's choice of sexual partners is not suspect"); *Steffan v. Perry,* 41 F.3d 677, 684, n.3 (D.C. Cir. 1994) (holding that a group "defined by reference" to homosexual conduct "cannot constitute a suspect class"); *Woodward v. United States,* 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990)

(Continued on following page)

Heightened review of section 21.06 as a statute discriminating on the basis of gender is likewise unnecessary. This Court's heightened scrutiny in gender cases has been directed at legislative classifications that "create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 534 (1996). Such heightened scrutiny has been mandated

> in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, *see Schlesinger v. Ballard*, 419 U.S. 498, 506-507 (1975), or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig v. Boren*, 429 U.S. 190, 198-199 (1976). See also *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women").

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135 (1994); *see also United States v. Virginia*, 518 U.S. at 532 (stating that the Court will "carefully inspect[ ] official action that closes a door or denies opportunity to women (or to men)").

Enforcement of section 21.06 does not involve gender stereotyping or exclusion. The homosexual conduct statute indulges in no stereotypes about the respective capabilities of men and women, and it does not penalize one gender at the expense of the other. *See Miller v. Albright*, 523 U.S. 420, 444-45 (1998) (rejecting claim of improper gender-based classification in Fifth Amendment equal protection analysis of statute because "[n]one of the premises on which the statutory classification is grounded can be fairly

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(holding that a homosexual "is not a member of a class to which heightened scrutiny must be afforded").

characterized as an accidental byproduct of a traditional way of thinking about the members of either sex"); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (holding that, while California's Proposition 209 mentions race and gender, it does not logically classify persons by race and gender).

Given these circumstances, heightened review for statutes that classify on the basis of sexual orientation or gender is neither raised nor required in this case.

B. The petitioners have not established their membership in the class for which equal protection relief is sought.

Before rational-basis review is necessary, the petitioners must establish that Texas impermissibly discriminated against *them*. From the record and the briefs, however, it is unclear what class the petitioners purport to represent in this challenge.

The classifications challenged in the petitioners' respective motions to quash the complaints against them in the trial court were the criminalization of "consensual sexual acts, including those in private, according to the sex and sexual orientation of those who engage in them," and the "discriminatory classification against gay people." *See* Pet. App. 119a-120a, 131a-132a. However, the record is silent as to the sexual orientation of the petitioners and whether the charged conduct was occurring consensually. *See id.*, Appendices E, F & G, pp. 107a-141a (entirety of trial court record).

In *United States v. Hays*, 515 U.S. 737 (1995), the Court summarized the elements necessary to establish standing:

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection

> between the injury and the conduct complained of . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 742-743 (1995). The Court emphasized that, to avoid dismissal on standing grounds, the party who seeks the exercise of jurisdiction in his favor must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute, and thereafter support this allegation by evidence adduced at trial. *Id.* at 743.

In this instance, if the petitioners contend that they were denied equal protection because they belong to the class of individuals who are foreclosed from having deviate sexual intercourse with another person of the same sex, they do not state an equal protection violation. Under the facially neutral conduct prohibitions of section 21.06, everyone in Texas is foreclosed from having deviate sexual intercourse with another person of the same sex. If the petitioners contend, however, that they were denied equal protection because they belong to a class of individuals who have been disproportionately impacted by section 21.06, the record is silent as to whether they in fact belong to such a class.

This Court accords equal protection standing only to "those persons who are personally denied equal treatment." *See id.* at 743-744 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984). While the petitioners clearly have been prosecuted under section 21.06, it is not established in this record that they possess the same-sex orientation that they contend is singled out for discrimination by the statute.

As such, the writ of certiorari should be dismissed as improvidently granted, or standing should be denied to these petitioners for lack of an adequate record to establish an equal protection violation against them personally.

C. The Texas Legislature did not purposefully discriminate in the passage of section 21.06.

Although the petitioners assert that the "group targeted and harmed by the Homosexual Conduct Law is, of course, gay people," *see* Brief of Petitioners 33, and much of their briefing is related to the unequal protection of the laws with respect to homosexuals, *see id.* at 40-50, section 21.06 does not expressly classify its offenders on the basis of their sexual orientation. Rather, it criminalizes homosexual conduct without reference to a defendant's sexual orientation. *Lawrence*, 41 S.W.2d at 353; *see also* Editors of the Harvard Law Review, *Sexual Orientation and the Law*, at 16 (Harvard University Press 1990) ("Although litigants and courts have assumed that [same-sex] sodomy statutes classify based on sexual preference, the statutes actually prevent all persons from engaging in same-sex sodomy, regardless of sexual orientation.").[24]

The focus of section 21.06 on conduct, rather than sexual orientation, does not foreclose equal protection review. A statute, though facially neutral, may still be challenged as constitutionally infirm under the Equal Protection Clause if the challenger can prove that the statute was enacted because of a discriminatory purpose. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). This intent component is significant: equal protection jurisprudence focuses on the purposeful marginalization of disfavored groups. *See id.* at 274, 279

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[24] The authors of the Harvard Law Review treatise go on to assert, however, that an invidious classification can be inferred from the disparate impact of the statute. *Id.* As will be discussed herein, disparate impact is insufficient in itself to establish an equal protection classification. There must be purposeful invidious discrimination against the affected class, and a review of the historical context in which the Texas statute was enacted does not suggest the presence of such discrimination.

(holding that "discriminatory purpose" implies more than intent as volition or intent as awareness of the consequences; it implies that the decisionmaker [in that case a state legislature] selected or reaffirmed a particular course of action at least partly "because of," and not merely "in spite of," its adverse effects upon an identifiable group); *Hernandez v. New York*, 500 U.S. 352, 372-73 (1991) (O'Connor, J., concurring) ("An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation.").

As such, assuming that petitioners appear as representatives of the class of individuals who are disproportionately affected by section 21.06, it is incumbent upon them to prove the purposeful intent of the Texas Legislature in order to perfect their equal protection claim. *Cf. State v. Baxley,* 656 So.2d 973, 978 (La. 1995) ("Given the presumption of the constitutionality of legislation which does not classify on its face, it is incumbent upon the challenger of the legislation to prove the discriminatory purpose. In the present case, the record is devoid of any evidence that the crime against nature statute was enacted for the purpose of discriminating against gay men and lesbians. Therefore, the statute is not constitutionally infirm on these grounds.").

The record on appeal – which essentially consists of complaints, "probable cause affidavits," motions to quash, and pleas of guilty – provides no such evidence. Likewise, the petitioners have submitted no evidence of the Legislature's intent to invidiously discriminate.

Although commentators have speculated that section 21.06 was enacted in its present form because of political concerns about the impact of decriminalizing homosexual conduct, an alternative interpretation of the Legislature's intent can be inferred from the historical context within which section 21.06 was passed.

In 1854, the State's Fifth Legislature determined that the conduct engaged in by the petitioners in this case – homosexual anal intercourse – should be punishable by hard labor in the penitentiary for up to five years:

> Sec. 40. If any person shall commit the abominable and detestable crime against nature, either with mankind or with any beast, he shall be punished by confinement to hard labor in the Penitentiary not exceeding five years.

Act of February 9, 1854, 5th Leg., R.S., ch. XLIX, § 40, 1854 Tex. Gen. Laws 58, 66.

Six years later, the Eighth Legislature increased both the minimum and maximum periods of confinement to be assessed upon conviction of that offense:

> Art. 399c. If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.

Act of February 11, 1860, 8th Leg., R.S., ch. 74, 1860 Tex. Gen. Laws 95, 97.

A Reconstruction-era Texas Supreme Court found the prohibition of the "abominable and detestable crime against nature" to be too vague to be enforced, *Fennell v. State,* 32 Tex. 378 (1869), but by 1893, the Court of Criminal Appeals was willing to look to the common law for guidance in determining what constituted a "crime against nature," and it found that the conduct prohibited by the statute was anal sexual intercourse. *See Prindle v. State,* 21 S.W. 360 (Tex. Crim. App. 1893).

In 1943, the statute was amended to the following form:

> **Article 524. Sodomy.**
>
> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use

> his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd and lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Act of April 5, 1943, 48th Leg., R.S., ch. 112, § 1, 1943 Tex. Gen. Laws 194 (hereinafter "article 524").

In 1965, this Court recognized in *Griswold v. Connecticut,* 381 U.S. 479 (1965), a constitutional right of privacy forbidding government regulation of a married couple's access to the use of contraceptives. Decisions followed that further delineated similar rights of privacy, including *Loving v. Virginia,* 388 U.S. 1 (1967), *Eisenstadt v. Baird,* 405 U.S. 438 (1972), and *Roe v. Wade,* 410 U.S. 113 (1973).[25]

As a result of those decisions, article 524 came under attack in federal district court, *see Buchanan v. Batchelor,* 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds,* 401 U.S. 989 (1971), and in the Texas Court of Criminal Appeals. *See Pruett v. State,* 463 S.W.2d 191 (Tex. Crim. App. 1971). The *Buchanan* court, a three-judge panel, declared article 524 unconstitutional because it violated the liberty of married couples in their private conduct by subjecting them to felony prosecution for private acts of sodomy, "an intimate relation of husband and wife." *Id.* at

[25] In fact, *Roe* was announced on January 23, 1973, just two weeks after the 63rd Texas Legislature convened on January 9, 1973, to enact the legislation that would ultimately include the 1974 Texas Penal Code. *See* 1973 Tex. Gen. Laws vi (noting date of convening as January 9, 1973).

732-33. The court declined to extend its holding to homosexual conduct, specifically noting the limited applicability of *Griswold* to the marital context. *Id.* at 733. The Court thus held article 524 unconstitutional "insofar as it reaches the private, consensual acts of married couples." *Id.* at 735.

Although *Buchanan* was later reversed by this Court and remanded for consideration as to whether abstention was necessary in light of the Court's decision in *Younger v. Harris,* 401 U.S. 37 (1971), and the Texas Court of Criminal Appeals ultimately declined to find article 524 unconstitutional in *Pruett,*[26] these cases were certainly within the constructive knowledge of the 1973 Texas Legislature as it considered what to do with the sodomy statute.

As such, it is a reasonable inference from this context that the Texas Legislature's enactment of section 21.06 in 1973 was not purposefully discriminatory against homosexuals, but was instead a reform of article 524 in accordance with what then appeared to be the direction in which constitutional privacy law was heading. The reformatory nature of the amendments is indicated as well by the Legislature's reduction of the offense from a felony punishable by confinement in the penitentiary for a minimum two years to a misdemeanor punishable only by a fine of up to two hundred dollars, and the Legislature's

[26] The reluctance of the Texas Court of Criminal Appeals to invalidate the sodomy statute in *Pruett* may have been related to the facts of the case. *Pruett* was essentially a homosexual rape case, in which the adult defendant "confessed that he committed the offense, after the victim had refused to consent, by striking him in the face with his fist and making him submit." *Pruett,* 463 S.W.2d at 192. The Court expressly noted that it had not been called upon to consider the "question of whether the sodomy statute may be invoked against married couples for private consenual [sic] acts." *Id.* at 194.

formulation of the statute to forbid only certain kinds of homosexual conduct.[27]

The residual differences left over from this kind of benign incremental reform do not amount to purposeful discrimination.[28] *See, e.g., McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969) ("[A] legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.") (citations omitted); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) ("[S]cope-of-coverage provisions are unavoidable components of most economic or social legislation. [The necessity of drawing a line of demarcation] renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.").

Because there is no evidence establishing that the Texas Legislature acted with discriminatory intent in 1973, the presumption of constitutionality persists. The

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[27] For example, the homosexual conduct statute does not forbid kissing or sexual stimulation of another person of the same sex with hands or fingers. *See Baker v. Wade*, 553 F. Supp. 1121, 1134 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

[28] The Texas Legislature reenacted the Texas Penal Code in 1993, leaving section 21.06 intact. Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3589. As was the case in 1973, this reenactment of the status quo was also consistent with the then-prevailing law with respect to recognition of privacy for homosexuals. *See Bowers v. Hardwick*, 478 U.S. 186 (1986). An invidious intent cannot be inferred from the Legislature's passive maintenance of the status quo.

petitioners have not demonstrated purposeful discrimination against the class they purport to represent.

D. Section 21.06 is rationally related to a legitimate state interest.

If a rational-basis analysis is necessary with regard to the promulgation of section 21.06, the State's legitimate interest in protecting its statute from constitutional challenge was in itself a rational basis for legislative action. In addition, section 21.06 rationally furthers other legitimate state interests, namely, the continued expression of the State's long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals.

1. Section 21.06 was enacted for the purpose of avoiding litigation and possible invalidation of the predecessor statute.

As noted above, section 21.06 was enacted by a 1973 Texas Legislature which was cognizant of changing judicial attitudes towards the constitutionality of legislation restricting private decisions of married couples. Accordingly, the decision to narrow article 524 was not the irrational product of invidious discrimination against homosexuals, but rather a reasonable retrenchment of the statute to address what may have been perceived to be a constitutional limitation of state authority to regulate marital behavior. No similar concerns existed at that time with respect to the possible constitutional protection of homosexual conduct, thus vitiating the need for immediate legislative reform in that direction.

For the reasons more fully expressed *supra*, this neutral motivation for the amendment of article 524 into the present-day statute – *i.e.*, to avoid a potentially successful challenge to the State's sodomy law by individuals

engaging in consensual heterosexual conduct – represents a rational basis for the classification of conduct upon which section 21.06 is based.

2. Section 21.06 furthers the legitimate governmental interest of promotion of morality.

The promotion of morality has long been recognized as a lawful function of government. *See, e.g., Barbier v. Connolly,* 113 U.S. 27, 31 (1884) (holding that the Equal Protection Clause was not intended "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people"); *Louis K. Liggett Co. v. Baldridge,* 278 U.S. 105, 111-12 (1928) ("The police power may be exerted in the form of state legislation . . . only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare."); *Berman v. Parker,* 348 U.S. 26, 32 (1954) (identifying "[p]ublic safety, public health, morality, peace and quiet [and] law and order" as appropriate "application[s] of the police power to municipal affairs"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion) (holding that police powers of the State extend to "public health, safety and morals").

Similarly, protection of family and morality has motivated many valid governmental actions. *See, e.g., Barnes*, 501 U.S. at 569 (recognizing legislature's right to "protect 'the social interest in order and morality'" in enacting public indecency statutes); *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) (protection of "integrity of the marital union" as legitimate state interest for denying third-party standing to challenge legitimacy of birth); *City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (protection of teenagers from "corrupting influences" as legitimate state interest for limiting access to dancehall); *Ginsberg v. United States,* 390 U.S. 629, 639 (1968) (approving legislature's legislation against distribution of "girlie magazines"

to minors because "legislature could properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility").

This moral component was at the core of the Fifth Circuit's decision affirming the constitutionality of section 21.06 in 1985. Sitting *en banc,* that court found that "in view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries," section 21.06 was rationally related to the implementation of "morality, a permissible state goal," and, therefore, did not violate the Equal Protection Clause. *Baker v. Wade,* 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). Other courts at that time reached similar conclusions. *See Dronenburg v. Zech,* 741 F.2d 1388, 1397 (D.C. Cir. 1984) (upholding naval regulations excluding homosexuals from service as a permissible implementation of public morality, and noting the unlikelihood that "very many laws exist whose ultimate justification does not rest upon the society's morality"); *State v. Walsh*, 713 S.W.2d 508, 511-12 (Mo. 1986) (holding that "punishing homosexual acts as a Class A misdemeanor . . . is rationally related to the State's constitutionally permissible objective of implementing and promoting the public morality").

Shortly before the courts in *Baker* and *Dronenburg* upheld legislation related to homosexual conduct, the Eleventh Circuit reached an opposite conclusion with respect to Georgia's sodomy statute. *See Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985) (holding that the Georgia statute implicated Hardwick's fundamental rights because his homosexual activity was a private and intimate association placed beyond the reach of state regulation by the Ninth Amendment and the "notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment").

This Court granted the Georgia Attorney General's petition for certiorari, and declined to invalidate Georgia's

sodomy statute, finding that there was no fundamental right to engage in homosexual sodomy. *Bowers*, 478 U.S. at 191. In reaching this conclusion, the Court noted the long history of moral disapproval of homosexual conduct, noting that "[p]roscriptions against that conduct have ancient roots," and that, until 1961, sodomy had been illegal in all fifty states. *Id.* at 192; *see also id.* at 196-97 (Burger, C.J., concurring) (detailing historical genesis of sodomy statutes).

This Court dismissed Hardwick's assertion that there was no rational basis for the Georgia sodomy statute, explicitly rejecting the notion that laws may not be based upon perceptions of morality:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Id. at 196. This Court shortly thereafter declined to review the constitutionality of section 21.06 of the Texas Penal Code. *See Baker v. Wade*, 478 U.S. 1022 (1986) (denying petition for writ of certiorari).

Nothing in this Court's jurisprudence since *Bowers* justifies revisiting its conclusion that morality constitutes an appropriate basis for legislative action. Petitioners cite *Romer v. Evans*, 517 U.S. 620 (1996) as antithetical to

Bowers, but a careful review of *Romer* indicates that its application of equal protection principles to an overbroad state constitutional amendment does not implicate the legislature's authority to prohibit what has traditionally been perceived as immoral conduct.

In *Romer*, the citizens of the State of Colorado approved a constitutional amendment that invalidated municipal ordinances banning discrimination on the basis of sexual orientation, and prohibited all legislative, executive or judicial action at any level of state or local government designed to protect homosexuals, lesbians, or bisexuals. *See id.* at 627. The Court summarized the impact of the amendment:

> Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

Id.

In overturning the amendment on equal protection grounds, the Court found that the statute "has the peculiar property of imposing a broad and undifferentiated disability on a single named group" that is "at once too narrow and too broad," identifying "persons by a single trait and then den[ying] them protection across the board." *Id.* at 632-33. In other words, the Colorado initiative was held unconstitutional because it went beyond punishment of the act of engaging in homosexual conduct and sought to disenfranchise individuals because of the mere tendency or predilection to engage in such conduct.

Section 21.06 does not suffer from that flaw. It is the homosexual conduct that is viewed as immoral, and a statute rendering that conduct illegal is obviously related to the goal of discouraging the conduct and thereby implementing morality. A statute that, say, prohibited all

individuals with a homosexual orientation from attending public schools would not be rationally related to that goal and would violate the Equal Protection Clause, but a statute imposing criminal liability only upon persons who actually engage in homosexual conduct is perfectly tailored to implement the communal belief that the conduct is wrong and should be discouraged.

Notably, the issue of morality as a rational basis for the amendment was not implicated in *Romer*.[29] The lawyers challenging Amendment 2 did not ask this Court to overrule *Bowers*, and the lawyers for the State of Colorado avoided relying on it in their arguments. *Romer*, 517 U.S. at 635 (identifying primary rationale for Amendment 2 as "respect for other citizens' freedom of association" and Colorado's "interest in conserving resources to fight discrimination against other groups"); 517 U.S. at 641 (Scalia, J., dissenting) ("Respondents' briefs did not urge overruling *Bowers*, and at oral argument respondents' counsel expressly disavowed any intent to seek such overruling."); *see generally* Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. Colo. L. Rev. 373, 375 & notes 13-14 (1997) (discussing general absence of advocacy related to *Bowers* in the *Romer* litigation).

In the absence of any party raising morality as a justification, the *Romer* court prudentially declined to raise the issue itself. As the court below observed:

[29] The Colorado constitutional amendment, which one commentator characterized as a "squirrelly antigay initiative adopted by narrow margins in an outlier state," *see* William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 229 (1999), lent itself to a holding that bypassed the role of morality in legislation. *See also* Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. Colo. L. Rev. 387, 408 (1997) (arguing that *Romer* is generally limited to its facts because "it is Amendment 2's unjustifiable and unprecedented scope, [its] 'sheer breadth,' that distinguishes it" from other legislation).

> *Romer* . . . does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.

Lawrence, 41 S.W.3d at 355. As such, *Romer* does not contradict the ultimate conclusion in *Bowers* – that majoritarian moral standards can be a rational basis for prohibitions against certain homosexual conduct.

The State does not dispute that invidious intent can be inferred from classifications based on race, gender, economic status, or mental retardation. *See, e.g., Palmore v. Sidoti,* 466 U.S. 429 (1984) (reversing order denying custody based on racial considerations); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (reversing gender-based classification in distribution of military benefits); *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973) (striking down grossly overbroad classification discriminating against "individuals who live in households containing one or more members who are unrelated to the rest"); *Cleburne,* 473 U.S. 432 (1985) (striking down zoning restriction against group home for mentally retarded based on negative reactions of neighbors to proximity). In those cases, the Court fairly reduced the asserted bases for discriminatory classifications to unsubstantiated negative views about the affected individuals. *See Romer*, 517 U.S. at 635 (prohibiting "status-based" legislation that is "a classification of persons undertaken for its own sake").

Those classifications do not implicate a moral component, though, as does a classification identifying types of homosexual conduct. As previously noted, the history of prohibitions against homosexual sodomy – in the common

law, American law, and Texas law – is ancient, and the legislature's deference to these moral traditions is appropriate and rational.[30]

The prohibition of homosexual conduct in section 21.06 represents the reasoned judgment of the Texas Legislature that such conduct is immoral and should be deterred.[31] Although the application of sodomy statutes is not common because of the nature and circumstances of the offense, the statutes, like many others, express a baseline standard expressing the core moral beliefs of the people of the State. Whether this Court perceives this position to be wise or unwise, long-established principles of federalism dictate that the Court defer to the Texas Legislature's judgment and to the collective good sense of the people of the State of Texas, in their effort to enforce public morality and promote family values through the promulgation of penal statutes such as section 21.06.

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[30] *See* Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L. Rev. 1501 (1989), arguing that deference to traditions of morality is "natural and inevitable . . . but it is also *sensible*":

> An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast, is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience – the experience, that is, of whether they advance the good life.

[31] In fact, although the statute is unlikely to deter many individuals with an exclusively homosexual orientation, the Legislature rationally could have concluded that section 21.06 would be effective to some degree in deterring the remaining population (i.e., persons with a heterosexual or bisexual orientation) from detrimentally experimenting in homosexual conduct.

III. Summary.

Public opinion regarding moral issues may change over time, but what has not changed is the understanding that government may require adherence to certain widely accepted moral standards and sanction deviation from those standards, so long as it does not interfere with constitutionally protected liberties. The legislature exists so that laws can be repealed or modified to match prevailing views regarding what is right and wrong, and so that the citizens' elected representatives can fine-tune the severity of the penalties to be attached to wrongful conduct. Perhaps homosexual conduct is not now universally regarded with the same abhorrence it inspired at the time of the adoption of our Federal Constitution, but any lag in legislative response to a mere change of public opinion – if such a lag actually exists – cannot and must not constitute the basis for a finding that the legislature's original enactment exceeded its constitutional authority.

As stated in *Glucksberg*, 521 U.S. at 735-36, there is "an earnest and profound debate about the morality, legality and practicality" of the statute in question; and the affirmance of the decision of the court of appeals in this case will "permit this debate to continue, as it should in a democratic society."

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be dismissed as improvidently granted, or, in the alternative, that the judgment of the Texas Court of Appeals for the Fourteenth District should be in all things affirmed.

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Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

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The Court should reject Respondent's meritless and untimely arguments for avoiding a decision on the important questions presented and should enforce the core rights of liberty and equal protection that are at stake in this case. Texas has no proper role supplanting the individual decisions of adults with the legislature's or electorate's different judgments concerning the private, intimate relations proscribed by the Homosexual Conduct Law, nor any legitimate basis for singling out same-sex couples for a criminal ban. Through this law, Texas flouts the essential American values of privacy and equal justice for all. Those values, jointly embodied in the Fourteenth Amendment, are critical limits on the power of the State that require vindication here.

I. Respondent's Objection to Consideration of the Questions Presented Is Waived and, in Any Event, Meritless.

Texas begins with a belated plea for the Court to dismiss this case. The State now objects to consideration of the questions presented on the ground that the record does not reveal more, beyond the scope of the crime charged, about Petitioners' sexual relations or orientations. That objection is waived because it was not raised in the State's opposition to the petition for certiorari. *See* Sup. Ct. R. 15.2; *City of Canton v. Harris*, 489 U.S. 378, 383-85 (1989). Moreover, it has no merit.

Speculation that Petitioners might have committed some other offense that was neither charged nor proved cannot save the constitutionality of this law or Petitioners' convictions under it. This is a criminal prosecution; therefore, the State must allege and prove the elements necessary for conviction. *In re Winship*, 397 U.S. 358, 364 (1970); *see Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Petitioners were charged with and convicted of the crime of "Homosexual Conduct" simply for "engag[ing] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." Pet. App. 127a, 129a; *see also id.* 114a-15a (State's evidence offered on Petitioners' pleas of *nolo contendere*). The record also shows that Petitioners are unmarried adults and that the police intruded on and arrested them in Lawrence's home. *Id.* at 129a, 141a. If the State had wanted to premise its actions here on something more, *the State* would have had to allege and

prove one or more additional elements. Texas cannot avoid a challenge to this law and Petitioners' convictions by speculating that their conduct might have involved additional facts. *E.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 464-65 (1972) (White, J., concurring in result).[1] This case cleanly presents the question whether "consensual, adult, private sexual relations," without more, may be punished by the State. Pet. App. 118a, 131a.

Equally meritless is the State's suggestion that Petitioners may not challenge the statute's discriminatory classification because they did not separately prove they are "exclusively homosexual." Resp. Br. 7, 33-34.[2] The State determined that Petitioners fell within the statutory classification and convicted them for conduct that would have been perfectly legal for different-sex intimate partners. They are the direct victims of the discrimination they challenge, discrimination that is explicit in the terms of the statute. It is hard to imagine circumstances that would more strongly support standing and the need to resolve whether Texas employs a permissible classification.

A few *amici* – but not Texas – also contend that Petitioners can assert only a facial challenge and that *United States v. Salerno*, 481 U.S. 739 (1987), governs that challenge. They are incorrect. Section 21.06 was applied to Petitioners in these criminal prosecutions, and they challenge it both as applied and facially. Pet. App. 117a, 130a.[3] Even with respect to the facial challenge,

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[1] Similarly, if a person were convicted under a law that made it a crime simply to walk down the street, the State could not insulate the conviction or law from review by speculating that while walking down the street the defendant might have possessed illegal drugs. *Cf. City of Chicago v. Morales*, 527 U.S. 41 (1999).

[2] Texas casts this argument in terms of "standing," Resp. Br. 33-34, yet it concedes that "petitioners possess standing to challenge the constitutionality of a statute under which they have actually been prosecuted and convicted," *id.* at 7. The jurisdictional "case or controversy" requirement is plainly satisfied here. *See, e.g., Eisenstadt*, 405 U.S. at 443-44.

[3] Petitioners' pleas of *nolo contendere* preserved their facial and as-applied challenges. *See* Tex. Code Crim. Proc. Ann. art. § 44.02; *Morgan v. State*, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985). The court of appeals described Petitioners' challenge in passing as facial, but that was apparently a reference to the absence of any Fourth Amendment attack on the police entry into Lawrence's home, *see* Pet. App. 5a, and the state court proceeded to consider Petitioners' challenge in light of the law's application to Petitioners for conduct "engaged in by consenting adults in private," *id.* at 24a; *see also id.* at 26a.

Salerno does not apply here.[4] Most importantly, *Salerno* is easily satisfied, because mere proof of a Homosexual Conduct offense is *always* constitutionally defective and discriminatory. The State's potential ability to criminalize sexual conduct under a *different* law that does not use an impermissible classification and that requires proof of additional elements cannot save the facial invalidity of *this* law.

II. The Homosexual Conduct Law Unconstitutionally Burdens a Fundamental Right.

The State's defense of the Homosexual Conduct Law against Petitioners' fundamental rights challenge is based almost entirely on history well past, to the exclusion of all other considerations. That single-minded focus is not true to this Court's fundamental rights jurisprudence. It ignores the critical personal interests at stake. And it distorts both the history Texas relies on and the last half-century's decisive rejection of state intrusion in this area.

1. The State's contention that fundamental rights are always circumscribed by legislation in effect in the past cannot be squared with this Court's precedents. How far government may go in reducing its citizens to mere creatures of the State, whose most private lives are policed according to majority sentiment, must be answered through "reasoned judgment" and is "not susceptible of expression as a simple rule." *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 849 (1992).

In *Casey*, the Court carefully reviewed its precedents and

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[4] *See, e.g., Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 894-95 (1992) (facially invalidating law inhibiting fundamental liberty in "large fraction" of cases); *Berkley v. United States*, 287 F.3d 1076, 1090 n.14 (Fed. Cir. 2002) ("in equal protection cases involving facial challenges, the Supreme Court has . . . not discussed or applied the *Salerno* test").

definitively rejected the position "that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," because that contraction of fundamental rights "would be inconsistent with our law." *Id.* at 847; *see also id.* at 848 (citing precedents expanding liberty beyond 19th-century confines). And *Casey* itself struck down a spousal notification law that was "consonant with the common-law status of married women" – and thus with historical legal tradition – but "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution." *Id.* at 898.

Texas relies primarily on the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and on *Washington v. Glucksberg*, 521 U.S. 702 (1997). Yet those cases do not break from the Court's long-standing recognition that traditions and liberties evolve, *see Casey*, 505 U.S. at 850, and do not support a rigid, strictly historical view of fundamental rights. In *Michael H.*, a majority of the Justices expressly *rejected* the plurality's statements on this very point. 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring in part); *id.* at 137-41 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., dissenting). And *Glucksberg* was a case in which tradition, contemporary legislation, and powerful state interests all coincided to defeat the claim that a fundamental right was at stake. *See* 521 U.S. at 716-19, 728-35. Thus, in *Glucksberg* the Court had no occasion to decide that history alone is decisive, much less to overrule its precedents holding just the opposite. *See also County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring). While the Court examines relevant history in all cases, the personal liberty that is protected by the Due Process Clause is not perpetually frozen in the mold set by the laws of 1868 or any other bygone age. Nor is the Court's job merely to mirror all changes around it. The Court must apply its "reasoned judgment" to determine the deeper question of what is required to protect Americans' ordered liberty today.

2. The State here steps over the line and beyond its proper

powers to invade an essential American liberty. The fundamental rights question in this case turns on who has the power to make basic decisions about the specifics of sexual intimacy between two consenting adults behind closed doors. Is the decision about expressions of intimacy and choice of partner for two adults to make through mutual consent, or for the State to control through a criminal law enacted by the legislature?

In this most personal realm of human existence, the Constitution limits government's power to substitute the preferences of the majority for the individual choices of adults. Three previously recognized aspects of liberty point to that conclusion: the liberty interests in intimate relationships, bodily integrity, and the privacy of the home. Texas tries to isolate these liberties as discrete and unrelated legal technicalities, but in truth they are aspects of a single continuum that comprises the fundamental rights of a free people. *See Casey*, 505 U.S. at 848-49.

The virtually unlimited power to regulate sexual intimacy claimed by Texas directly interferes with constitutionally protected intimate associations. The relationship of an adult couple – whether heterosexual or gay – united by sexual intimacy is the very paradigm of an intimate association in which one finds "emotional enrichment" and "independently . . . define[s] one's identity," and it is protected as such from "unwarranted state interference." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (family and other highly personal relationships protected under rubric of intimate association); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987) (same). The State impairs the protected relationship of two adults whose shared life includes sexual intimacy by regulating – or even outright forbidding – the sexual dimension of their relationship. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

In addition, Texas's view of the constitutional status of the home ignores the foundational connection between protection of the home and protection of the private intimacies that are nurtured there. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting). Likewise, the State's dismissive response

to Petitioners' fundamental interests in bodily integrity fails to come to grips with the reality that this case concerns the *government's* attempt to *dictate* whom one must take as a sexual partner – a person of the other sex – and the specific state-approved acts that may be performed. That implicates bodily integrity because the State is using the criminal law to impose the majority's own sexual preferences on every individual. Indeed, the State's *amici* would justify the law precisely because it attempts to compel (or "channel" people into) heterosexual relationships. By outlawing most types of sexual intimacy with any partner of the same sex, the State drastically interferes with a core aspect of personal liberty.

3. Gay Americans have the same liberty interests as heterosexuals here. Pet. Br. 16-19; Am. Psych. Ass'n. Br. 15-23. Texas does not appear to argue otherwise. Instead, although the law at issue does not do so, the State "urges the Court to draw the line at the threshold of the marital bedroom," Resp. Br. 24, thereby permitting government regulation or prohibition of *all* sexual intimacy outside marriage, whether with another adult of the same or different sex. But adult Americans who remain unmarried are not mere wards of the State who have ceded total dominion over the most intimate details of their lives to a majority of their neighbors or legislators. Texas's attempt to limit the fundamental interest at stake in this case to marital unions must be rejected.

Nor is restriction of this fundamental liberty to married persons supported by the Court's decisions. It is true that the Court's earliest privacy decisions, *Griswold* and Justice Harlan's dissent in *Poe*, suggested special solicitude for sexual relations in marriage. Since then, however, the Court has made clear that such rights belong to *individuals*, whether married or unmarried. *Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Carey v. Population Servs. Int'l*, 431 U.S. 678,

687 (1977) (same); *Casey*, 505 U.S. at 898 ("The Constitution protects all individuals . . . , married or unmarried, from the abuse of governmental power . . . ").

Of course, the Court's contraception and abortion cases did not directly present the question whether unmarried adults have fundamental liberties regarding *sexual* intimacy, and the Court expressly reserved that question in *Carey*, 431 U.S. at 688 n.5.[5] The logic of those decisions, however, mandates recognition that unmarried as well as married adults have a fundamental liberty interest in their private sexual relations. If the right to decide whether to bear or beget a child is for the *individual*, married or unmarried, the concomitant right to decide whether and with whom to engage in sexual intimacy cannot be for married couples only. Indeed, an unmarried individual could not meaningfully exercise the right to decide to bear or beget a child if the State may ban the sexual relations that lead to procreation. By the same token, the State may not ban sexual relations by unmarried persons that do *not* lead to procreation. The core teaching of the contraception cases is that the State may not force individuals to have only procreative sex. Thus, Texas's far-reaching argument that it may police the sexual choices of all unmarried adults – and may criminalize all same-sex intimacy as one aspect of that unconstrained power – cannot be accepted. Rejecting Texas's argument, and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), will bring coherence to the Constitution's protection of this deeply personal sphere for *all* adult Americans.

4. The history of regulation in this area also supports recognition of the fundamental liberty interests Petitioners assert. Indeed, Americans recognized long ago that government does not belong in the bedrooms of its citizens to mandate or forbid particular expressions of consensual intimacy. Since the Founding, such private policing has not been the norm. There is not a single reported 19th-century case clearly upholding a sodomy conviction

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[5] Likewise, *Eisenstadt* held that the law there was not reasonably related to preventing sex outside marriage, without deciding whether the State could actually prohibit that conduct. 405 U.S. at 447 n.7, 448, 451 n.8.

for *private* consensual conduct between two adults. *See* Cato Br. 11-12 & App. 2; ACLU Br. 13-15; History Profs. Br. 7-9. Though the facts are not reported in all cases, in many they are, and every one of those involves force, minors, animals, or public places. Cato Br. App. 2.[6]

While the States historically had laws that technically applied to private consensual conduct, the vast majority of the laws proscribed specific conduct whether committed with a person of the same or different sex. Pet. Br. 5 & n.2, 21-22; Cato Br. 9-10 & n.13; History Profs. Br. 7, 10; ACLU Br. 12. Indeed, the laws often applied to married couples. *See Model Penal Code and Commentaries* § 213.2, cmt. 1, at 360 (1980). Thus, older laws did not single out "homosexual sodomy," and they applied to conduct that Texas concedes is constitutionally protected today.[7]

Most significantly, over the last half-century the States have rejected altogether laws that criminalize certain forms of private sexual intimacy between two consenting adults. Texas attempts to trivialize this decisive historic turn as a mere "experiment" by a handful of States acting as laboratories. In reality, it reflects a profound judgment about the limits of government control over the intimate and private details of the lives of Americans.

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[6] Texas's *amicus* Center for Original Intent of the Constitution (COIC) distorts the historical record. For example, COIC quotes dicta from *Mercer v. State*, 17 Tex. App. 452 (1885), to argue that sodomy laws were enforced against consensual private adult conduct. COIC Br. 17. In fact, *Mercer* was a prosecution for incest in which the defendant repeatedly raped his daughter from the time she was 13. 17 Tex. App. at 453-54, 456-57. None of the cases cited by COIC expressly upheld a conviction for private consensual sodomy between two adults.

[7] COIC tries to invent a tradition of discrimination by exaggerating the very small number of States with same-sex-only laws in the past. COIC Br. 10-14. For example, COIC counts Georgia as having a same-sex-only law in 1868, *id.* at 12 & n.19; in reality, the Georgia statute barred "carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code Ann. § 4286 (1867). Most of the other laws cited by COIC as same-sex-only referred to lying with "mankind," but those laws reached heterosexual conduct. *See* Cato Br. 10 n.13; *Rex v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1716).

Beginning in 1961, the legislatures of more than half the States repealed their sodomy laws in agreement with the influential policy of decriminalization expounded in the *Model Penal Code*. *See* Pet. Br. 23; *Bowers*, 478 U.S. at 194 n.7. "[T]he decisive factor favoring decriminalization . . . [was] 'the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality.'" *Model Penal Code and Commentaries* § 213.2, cmt. 2 (quoting Report of Committee on Homosexual Offenses and Prostitution, Great Britain, at 52 (Am. ed. 1963)); *see also* ABA Br. App. 10a-11a (1973 ABA report urging repeal because "such laws impinge on the constitutionally protected zone of privacy that surrounds each individual and serve no valid state purpose").

In addition, beginning in 1974, the courts of another eleven States struck down their sodomy laws (or narrowly construed them not to apply to private consensual conduct) in light of the laws' invasion of a realm that belongs to individuals, not the State.[8] These judicial invalidations likewise reflect a fundamental judgment that our system of ordered liberty bars government intrusion into this quintessentially private sphere based on the mere moral preferences of the majority. Pet. Br. 24. As the Tennessee court explained, "[i]nfringement of such individual rights cannot be tolerated until we tire of democracy and are ready for communism or a despotism." *Campbell v. Sundquist*, 926 S.W.2d 250, 261 n.9 (Tenn. Ct. App. 1996).[9] Today, consensual sodomy offenses remain on the books in only 13 States. Tellingly, only

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[8] *See* Pet. Br. 23 n.17 (listing cases); *Commonwealth v. Balthazar*, 318 N.E.2d 478, 481 (Mass. 1974), *reaffirmed by Gay & Lesbian Advocates & Defenders v. Attorney General*, 763 N.E.2d 38, 40 (Mass. 2002); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980).

[9] The same deep-seated understanding undergirds the general repeal or invalidation of laws criminalizing fornication. Pet. Br. 23 & n.18; *see, e.g.*, *Model Penal Code and Commentaries*, art. 213, note 3, at 437 ("assigning criminal punishment to instances of private immorality can justly be regarded as an invasion of personal liberty"); *State v. Saunders*, 381 A.2d 333, 343 (N.J. 1977) ("the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy").

four of those States appear here in defense of these laws.

Thus, our Nation's history of shielding the particulars of sexual intimacy between two adults from undue government interference is not limited to the decisions of "a few state appellate courts . . . in the 1990s," Resp. Br. 20. Rejection of intrusions on private sexual intimacy is centuries-old, and rejection of the invasive laws themselves is decades-old, extending to the vast majority of jurisdictions in this country. The significance of this tradition is reinforced by the fact that the movement has been all in one direction. In the 42 years since 1961, no State has turned backward from abolition, and none has initiated a campaign of enforcing sodomy laws against private consensual conduct. Our Nation's tradition of protecting fundamental rights is a "living thing," *Casey*, 505 U.S. at 850 (quotation marks omitted), and safeguarding this most private aspect of two adults' lives from unjustified state encroachment is an extremely vital part of that tradition today.

5. Texas and its *amici* expend considerable effort litigating cases that are not before the Court. They conjure up a parade of horribles – invalidation of laws against bestiality, prostitution, incest, adultery, bigamy – that will allegedly follow a ruling for Petitioners. Those are chimeras. Comparison of the intimate relations of two human beings – married or unmarried, same-sex or different-sex – with bestiality is simply offensive. Nor do the other kinds of laws in the parade involve such a wholesale and devastating burden on individual liberty as here – where *all* same-sex partners are prohibited, for a vast range of intimate acts. Moreover, in the other areas conjured up to distract the Court, the State has important interests not present here. *See* Pet. Br. 22 n.16; *infra* at 19.[10]

Petitioners have carefully defined the fundamental liberty interest at stake as freedom from undue State intrusion into the particular choices of sexual expression made by two consenting adults in private. A ruling that Section 21.06 violates that liberty

[10] Another chimera concerns the right to marry. Petitioners here assert a shield to be free from government interference, not any right to affirmative state recognition or benefits. *See infra* at 19.

interest will affect no laws other than those against sodomy and fornication. Those laws have already been repealed or invalidated in the vast majority of the States and are almost never enforced where they remain on the books.

6. Texas has not even tried to argue that there is any justification for Section 21.06 sufficient to withstand the scrutiny applicable to laws burdening fundamental rights. Nor could it. The only "justification" offered is the desire to force every individual and family to conform to the majority's preferred moral image. But state-compelled standardization by majority rule is antithetical to a fundamental right. *See* Pet. Br. 15-16, 28-29. American governments were not constituted to give one faction – "by the superior force of an interested and overbearing majority" – absolute power to dictate every last detail of the private lives of their neighbors. *See The Federalist* No. 10, at 123 (Madison) (Isaac Kramnick ed. 1987). To guard against that very tyranny, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. Where "liberty is infringed," it is "the function of this Court" to redeem that promise. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

III. The Homosexual Conduct Law Draws an Explicit Classification That Denies Equal Protection of the Laws.

Texas has convicted Petitioners under a criminal law that explicitly targets same-sex couples but not different-sex ones for the same behavior. The State cannot evade equal protection review by attempting to recast this law as a "neutral" conduct regulation, because the law expressly treats identical conduct differently depending on who is engaging in it. There is no permissible justification for that classification, even under the most deferential equal protection review. In this specific context, a judgment that the same conduct is immoral when engaged in by one class of persons, but not when engaged in by the majority, necessarily represents a negative judgment about the targeted class, not the conduct. Equal protection bars laws based on bare negative attitudes toward one group. And any other rationale

suggested by Texas or its *amici* also fails, for there is no rational and legitimate basis for this discriminatory criminal law.

1. Texas claims that Section 21.06 is a "facially neutral conduct prohibition[]." Resp. Br. 34. The statute itself belies that contention. Section 21.06 tells only same-sex couples that they are criminally forbidden from engaging in certain forms of sexual intimacy. Those in heterosexual couples – whether married to one another, married to someone else, committed unmarried partners, or newly acquainted – can freely engage in the very same behavior. The statute expressly discriminates on its face because it does not "reach other types of couples performing the identical conduct." *McLaughlin v. Florida*, 379 U.S. 184, 188-91 (1964) (overruling *Pace v. Alabama*, 106 U.S. 583 (1883), which had denied equal protection challenge where statute defined prohibited conduct in terms of the couples engaging in it). Likewise, in *Moreno*, the Court recognized that the conduct of living together was treated differently depending upon who was doing it: "one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 529 (1973). A different rule for conduct depending on who the participants are plainly triggers review as disparate treatment under "traditional equal protection analysis," *id.* at 533.[11]

Section 21.06's disparate classification of persons – no matter how its explicit discrimination is described – violates equal protection because it lacks any independent, legitimate, and rational State purpose. Pet. Br. 32-40; *infra* at 14-19. This classification, described in longhand, discriminates against those who are attracted to and engage in sexual intimacy with someone

[11] Thus, this is not a facially neutral law with merely a "disparate impact," *cf.* Resp. Br. 35. This classification's obvious discrimination "overtly or covertly" targets same-sex couples and cannot "plausibly" be considered "neutral." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274-75 (1979). In such a case, no separate analysis of discriminatory purpose is required. *Id.*

of the same sex. Contrary to Texas's protests, the classification is also accurately described as discriminating based on sexual orientation and targeting gay people – people with a same-sex sexual orientation. The State's efforts to avoid that description simply ignore the core, ordinary meaning of sexual orientation. Such efforts have been rejected repeatedly by courts considering this exact classification. *See, e.g., State v. Morales*, 826 S.W.2d 201, 204-05 (Tex. App. 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994); *Jegley v. Picado*, 80 S.W.3d 332, 350-54 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992).

That is because the essence of sexual orientation is determined by whether one's sexuality is directed toward those of the same sex, those of the other sex, or both. *See, e.g.*, Pet. Br. 33.[12] By criminalizing the behavior only of those who are sexually attracted to another of the same sex, and exempting those who direct sexual desire toward the other sex, Section 21.06 discriminates on the basis of sexual orientation. Under the challenged classification, gay men and lesbians may not express their sexual orientation through "deviate sexual intercourse," while heterosexuals are allowed to express their sexual orientation through the very same "deviate sexual intercourse." The characteristic of sexual orientation describes and parallels the exact, explicit line drawn here, imposing not "disparate impact" but absolute differential treatment on that basis. The law targets all those not in the dominant, heterosexual group.[13]

Just as there could be no doubt that a law that prohibited

[12] Sexual orientation is a relational characteristic, described by the respective genders of oneself and one's partner, and Section 21.06 uses the gender of one's partner to delineate the favored and disfavored sexual-orientation groups. Texas can take no refuge in the law's use of gender because, of course, gender-based classifications also are not facially neutral for equal protection purposes. *See also* Pet. Br. 32 n.24.

[13] Bisexuals are also targeted, for their sexual orientation includes sexuality directed toward another of the same sex. Like the Court in *Romer*, Petitioners use the group of "gay people" and "lesbians and gay men" to describe succinctly the targets of this classification. *See Romer v. Evans*, 517 U.S. 620, 624 (1996).

"writing with the left hand" targeted those who are left-handed and overtly discriminated on the basis of handedness, there can be no doubt that the Homosexual Conduct Law targets gay people and overtly discriminates on the basis of sexual orientation.[14]

2. In every equal protection case the Court must examine, at a minimum, whether a legal classification "bear[s] a rational relationship to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633 (1996). This is not determined by the actual thinking of legislators.[15] It is, rather, an assessment whether "plausible" reasoning leads to the conclusion that a legitimate, distinct purpose exists for the line drawn by the statute. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). No plausible reasoning links a permissible government purpose to criminalization of same-sex couples for the same behavior that is freely allowed for different-sex couples.

a. The State now patches together, for the first time, a hypothesis that Texas legislators may have wanted to avoid constitutional litigation over "state authority to regulate marital behavior" when they repealed the prior, evenhanded sodomy law. Resp. Br. 41; *see also id.* at 36-40. That guess at the historical sequence of events does not in any way justify the new law and its classification targeting same-sex couples. The State is positing good intentions in repealing the old law, not any legitimate "legislative end," *Romer*, 517 U.S. at 633, for the new one. Texas's affirmative enactment of the Homosexual Conduct Law in 1973 did not involve some complex "remedial scheme" or "incremental

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[14] Sexual orientation and handedness are both characteristics tied to behavior, but that does not take away their differentiation between people. Neither does the fact that some people are ambidextrous or bisexual, or that some might on occasion experiment contrary to their nature.

[15] There are tapes of legislative sessions concerning Texas's reform of its entire penal code in 1973, *see* Tex. Legislators Br. 13 & n.5, but those tapes do not illuminate any collective reasoning underlying the particular provision at issue here. *See generally* Randy Von Beitel, *The Criminalization of Private Homosexual Acts*, 6 Human Rights 23, 29-35 & nn. 43, 46-47 (1997); *Baker v. Wade*, 553 F. Supp. 1121, 1150-51 (N.D. Tex. 1982) ("[n]o legislative history is available"), *rev'd*, 769 F.2d 289 (5th Cir. 1985).

reform," Resp. Br. 40, but simply a decision to enact a same-sex-only sodomy offense, and the issue now before the Court is whether that law's classification has a valid purpose. Targeting same-sex couples for criminal penalties bears no rational relation to freeing married couples from regulation; those couples were freed with the repeal of the old law. Moreover, the line drawn by the new classification focuses in no way on marriage, but instead distinguishes between all same-sex and all different-sex couples. *See infra* at 17.

b. Throughout this litigation, Texas has asserted "the promotion of morality" as the basis for Section 21.06. Resp. Br. 42-48. As offered, however, that rationale is not independent of the classification, is illegitimate, and is irrational. Pet. Br. 35-40.

Texas seeks to broaden this case into a referendum about the moral basis for lawmaking. Resp. Br. 42-49. But the case does not call for any absolute and sweeping statements about morality as a justification for laws. Petitioners are not arguing that morality can never be the basis for legislation. So long as fundamental rights and equal protection requirements are left intact, government can enact moral positions into law. Typically, a moral idea coincides with lawmaking that addresses a concrete harm or need of the State. As Texas concedes, *Bowers* "stands alone as the only modern case in which this Court has approved moral tradition as a submitted rational basis for legislation," without any connection to tangible harms or needs. Resp. Br. 27.

Bowers did not consider equal protection and did not decide the narrow issue about morality now before the Court: May the State enact a criminal law solely to express the legislature's or electorate's greater moral disapproval of same-sex couples than of different-sex couples when they do exactly the same thing? Texas says the majority finds it "more 'immoral and unacceptable'" for persons of the same sex to engage in the prohibited acts than for persons of different sexes to engage in the same acts. Resp. Br. 48; Br. in Opp. 18. But a discriminatory moral code – *i.e.*, moral condemnation of one group but not another for the very same conduct – merely expresses disapproval

or negative attitudes toward the *group* condemned. It is being held to a higher moral standard than the majority that is judging it. Such negative attitudes toward a class of persons are an impermissible basis for lawmaking. Negative attitudes toward a class do not become a legitimate ground for adverse treatment simply by appending the term "moral" to them. Pet. Br. 36-40.[16]

The State glaringly rewrites history when it claims that entering into an interracial marriage, or breaking down gender-based employment barriers, or living together in a commune or other household of unrelated persons did not engender moral objections. Resp. Br. 47-48. *See, e.g., Moreno*, 413 U.S. at 535 n.7 ("Government initially argued ... that the challenged classification might be justified as a means to foster 'morality'"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982) (noting false idea that women's equal employment opportunities would cause "moral and social problems"). As in the past, morality is being used in this case to refer to discomfort with and dislike of a particular social group. That is not a form of morality that equal protection of the laws allows. *See Romer*, 517 U.S. at 633-35; *Moreno*, 413 U.S. at 533-38; *see also Wasson*, 842 S.W.2d at 501; *Jegley*, 80 S.W.3d at 353.

c. Though Texas limits its defense of its law to the two arguments addressed above, various *amici* search for other possible rationales. That search is unavailing. The classification drawn in Section 21.06 bears no rational relation to any conceivable and permissible State purpose.

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[16] The goal of deterring the prohibited conduct, *see* Resp. Br. 41, is not separate from the law's own statement of policy and does not explain its classification. Moreover, Texas never offers any concrete problem or "factors which are properly cognizable" by government, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985), that could explain uniquely punishing same-sex couples. Its only aim here is consistency with the majority's discriminatory morality. Resp. Br. 48 (statute expresses "baseline standard" of "moral beliefs of the people of the State"); *id.* at 48 n.31 (insinuating that same-sex "deviate sexual intercourse" is "detrimental" in some way that different-sex "deviate sexual intercourse" is not, but never identifying detriment).

Many of the *amici* are attempting to defend a law that classifies between married and unmarried couples, but that is not this law. *All* heterosexual couples, whether they are in a one-night stand, an adulterous affair, or a committed relationship outside marriage, were freed by the legislature's actions in 1973, while all same-sex couples became the unique targets of the Homosexual Conduct Law. Section 21.06 was adopted as part of a penal code overhaul that abolished criminal penalties not only for all heterosexual "deviate sexual intercourse," but also for adultery and fornication. Pet. Br. 5. Particularly in the context of the whole code revision that brought it about, this law cannot conceivably be described as promoting or protecting marriage.[17]

Other *amici* contend that the classification here is rationally related to protecting public health, particularly with respect to HIV and AIDS. These arguments seek to tap into the destructive myth that particular persons are responsible for HIV and other diseases to justify a blunt ban that is not a public health tool. As explained in the *amicus* brief of the American Public Health Association *et al.*, the classification in Section 21.06 is wholly unrelated to the prevention of HIV infection. Am. Pub. Health Ass'n (APHA) Br. at 10-27.[18] The lack of any fit is not surprising,

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[17] Nor does the classification in Section 21.06 serve the purported goal of "funneling sexual activity into the bonds of marriage." Tex. Legislators Br. 23. Section 21.06 and the 1973 changes as a whole actually freed much more non-marital, heterosexual intimacy from criminal regulation and *took away* criminal law pressure on heterosexuals to marry.

[18] APHA *et al.* represent the nation's major associations of public health professionals. *See* APHA Br. 1-3. In stark contrast, the State's *amici* who argue for a connection between the discriminatory standard of the Homosexual Conduct Law and HIV prevention do not offer public health expertise. *See* Pro Family Law Ctr. (PFLC) Br. 1-2 (*amici* are advocacy groups "opposing the legitimization of homosexuality"); Tex. Phys. Resource Council Br. 1 (*amici* approach health issues from Christian perspective and "appl[y] principles of faith and morality to modern medical science and practice"). Instead, they offer offensive and inaccurate generalizations. For example, PFLC quotes an article about HIV transmission from *Rolling Stone* magazine as if it were authoritative, PFLC Br. at 3, even though the sources cited by that article have publicly accused *Rolling Stone* of fabricating the statements attributed to them; notwithstanding the plain inaccuracies,

as the law was enacted well before HIV was even known to exist. The Homosexual Conduct Law bans all oral and anal sex as well as sex with an object for all male-male and female-female couples, but not the same forms of sexual conduct for heterosexual couples. That classification, based solely on the same-sex character of the couple, sweeps vast amounts of very safe sexual intimacy into the prohibition, while leaving much riskier conduct unregulated for a man and a woman. For example, female same-sex couples have exceedingly low rates of HIV and other sexually transmitted diseases – rates that are much lower than those for the heterosexual couples whose sexual conduct is completely unregulated – yet Section 21.06 criminalizes the sexual intimacy of all female same-sex couples. Likewise, it is well known that oral sex (or sex with an object), which is banned for all same-sex couples, is much safer than vaginal or anal intercourse, which are freely permitted for heterosexual couples. In addition, anal intercourse is precisely the same act for any couple that chooses it, yet it is criminalized only for same-sex couples. *See id.* at 10-18. Moreover, the State takes the position that this rarely enforced law does not actually deter any sexual conduct between gay persons. Resp. Br. 48 n.31. It certainly does not even differentiate between safe or protected acts and riskier ones. Far from helping, the Homosexual Conduct Law hampers public health initiatives. APHA Br. 18-27. Like Texas, the Court should reject the *amici*'s "public health" arguments as irrational and unrelated to the challenged classification.

In this realm of sexuality, as in any other, the particular classification drawn by each law must be assessed for rationality and "relevan[cy] to interests the State has the authority to implement." *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (quotation marks omitted). In contrast to other

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groups like PFLC are deliberately using the article to fuel anti-gay prejudice. *See* Seth Mnookin, *Using 'Bug Chasers,'* Newsweek, Feb. 17, 2003, at 10; Seth Mnookin, *Is Rolling Stone's HIV Story Wildly Exaggerated?*, Newsweek Web Exclusive, Jan. 23, 2003. *See also* Ctr. for Ariz. Policy Br. 1-2 (*amici* with no mental health expertise or scientific credentials make arguments about mental health from perspective of "traditional moral values").

laws invoked by *amici*, this is not a statute in which a legislature has drawn distinctions to ensure that sexual intimacy is consensual, to protect the welfare of children, to regulate and discourage the business of prostitution, to delineate and enforce the legal relationship of marriage, or to keep sexual activity from public places. Distinguishing between couples, for the same common forms of intimacy, based solely on whether they are same-sex or different-sex bears no rational relationship to any conceivable, legitimate interest of the State.

3. The State's *amici* seek to divert attention from the Homosexual Conduct Law's discriminatory intrusion into private intimacies by asserting that Petitioners' equal protection claim is "tantamount to a challenge to the constitutionality of limiting marriage to a heterosexual couple." Am. Ctr. for Law and Justice (ACLJ) Br. 10. To the contrary, Petitioners seek equality under the criminal law, to keep the State out of their bedrooms, not any affirmative access to marriage or other legal structures or benefits. This canard was also offered in *Romer* to distract the Court, *see* Brief of *Amicus Curiae* Concerned Women for America, Inc., 1995 WL 17008430 at *23-24, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), and has no more validity here.

Enforcing the guarantee of equal treatment under the law requires not a "sweeping, novel constitutional decision," ACLJ Br. 1, but a decision comporting fully with past precedent and basic fairness. One should not be convicted of a crime, or face stigma and other penalties flowing from a criminal law, for engaging in forms of intimacy that other adults may freely enjoy.

4. Texas and its *amici* defend the Homosexual Conduct Law as if there were no history of anti-gay discrimination in this country and as if this law did not function as a badge of inferiority, spreading harms well beyond direct criminal prosecutions. *See* Pet. Br. 40-50. But those realities cannot simply be ignored, especially in a case where the State is defending a rarely enforced law as an official expression of condemnation of those Texans who have intimate same-sex relationships. *See* Resp. Br. 48. Indeed, Texas previously stipulated that Section 21.06 "brands

lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales*, 826 S.W.2d at 202-03; *see also, e.g.*, ABA Br. 12-14; Human Rights Campaign Br. 12-13. Government and private actors deny equal treatment to gay and lesbian citizens in direct reliance on Section 21.06 and other laws like it, because they understand perfectly well that same-sex-only sodomy laws brand gay people with second-class status. As in *Romer* and many earlier cases, the Court should here play its critical role of ensuring that lawmaking does not simply impose inequality on one group of citizens and encourage their further mistreatment and harassment.

5. Finally, the Court should not lose sight of the deeply personal interactions that are targeted by this discrimination. Petitioners' fundamental rights and equal protection claims reinforce each other. The State of Texas has singled out a small and disfavored minority of its citizens and criminalized the expressions of sexual intimacy they share with their chosen partners, but not the same sexual intimacy of others. That is a double affront to the promise of our Constitution. Because it discriminates at the core of the private sphere that is constitutionally protected against state intrusion, the Homosexual Conduct Law is "inconsistent not only with that equality of rights which pertains to citizenship . . . , but with the personal liberty enjoyed by every one within the United States." *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

CONCLUSION

The judgment of the Texas Court of Appeals upholding Section 21.06 and affirming Petitioners' criminal convictions thereunder should be reversed.

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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRONE GARNER,
Petitioners,

v.

TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Appeals Fourteenth District

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW PROFESSORS BRUCE A. ACKERMAN, JACK M. BALKIN, DERRICK A. BELL, JR., PAUL BREST, EVAN CAMINKER, ERWIN CHEMERINSKY, DAVID D. COLE, DAVID B. CRUZ, THOMAS C. GREY, PAMELA S. KARLAN, KENNETH L. KARST, ANDREW KOPPELMAN, SANFORD LEVINSON, FRANK MICHELMAN, WILLIAM B. RUBENSTEIN, STEVEN H. SHIFFRIN, GEOFFREY R. STONE, AND KENJI YOSHINO IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The law professors named below teach and write about constitutional law. Both basic and advanced constitutional law courses, as well as a wide range of scholarship on constitutional issues, regularly consider the rights of gay men and lesbians. *Amici* are among the many scholars who have spent a considerable amount of time thinking, writing, and teaching about the issues before the Court in this case. A selected list of their scholarship on these issues is contained in an Appendix to this brief.

Based on this expertise, and on careful review of this Court's decisions, *amici* argue in this brief that Texas Penal Code § 21.06 violates the equal protection clause of the Fourteenth Amendment. *Amici* join this brief solely on their own behalf and not as representatives of their universities.[1]

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel contributed money or services to the preparation and submission of this brief.

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SUMMARY OF ARGUMENT

The petition for certiorari presents the question whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled. *Amici* support petitioners' position. But this Court need not reach that question—nor hold that heightened scrutiny is required for statutes that discriminate on the basis of sexual orientation—in order to conclude that Texas Penal Code § 21.06 violates the equal protection clause. The statute

fails conventional equal protection analysis because it is not rationally related to the achievement of a legitimate state interest.

In equal protection cases, the nature of the interests affected by a particular classification helps determine the nature of this Court's review. When classifications burden rights protected by the Constitution as "fundamental," this Court applies heightened judicial scrutiny. *See, e.g., Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). When classifications restrict the enjoyment of other liberty interests unequally, by restricting the freedom of some citizens, but not of others, the nature and importance of the interest involved also weighs in the Court's constitutional appraisal.[2] In cases such as *Plyler v. Doe*, 457 U.S. 202 (1982), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Romer v. Evans*, 517 U.S. 620 (1996), *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), and *Bush v. Gore*, 531 U.S. 98 (2000), this Court has found violations of the equal protection clause in part because of the way in which the challenged state action infringed on individuals' ability to participate in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631.

Section 21.06 and statutes like it similarly affect important liberties. The impact of these laws is not limited to those few individuals who are actually convicted of violating them and thus subject to the punishment and collateral consequences that flow from a criminal conviction. Rather, these statutes are used to undermine the "undeniably important" interest in "family association," *M.L.B.*, 519 U.S. at 117, that gay people possess. They are used to restrict employment opportunities for gay people, even when individuals have never been

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[2] Cf. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (taking into account the nature of a real property owner's "significant," but nonfundamental, interests in finding a violation of the due process clause test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

charged with—let alone convicted of—violating any law. And they impinge on important Fourth Amendment interests in the privacy of the homes and persons of gay men, lesbians, and bisexuals.

Part I of this brief sets out this Court's longstanding practice of considering the quality of the interests affected by a particular classification, even when it is conducting rationality review. It shows that the interests that § 21.06 impacts are vitally important to the individuals involved and thus counsel sensitive review.

Part II of this brief shows that § 21.06 is unconstitutional because it is not sufficiently related to the achievement of any legitimate government purpose. Section A demonstrates that § 21.06 does not even serve a legitimate government purpose. This Court has squarely held that the straightforward desire to harm a politically unpopular group cannot be a legitimate governmental interest. *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996). Section 21.06 conveys precisely this form of intolerance. Texas has identified no rationale for *why* it has condemned the acts prohibited by § 21.06 beyond its lawyers' declaration that the law reflects a choice about the morality of those acts.[3] Given the way § 21.06 actually operates, it does not serve as a means of preventing these acts. It can be explained only as a means of singling out gay people for burdens not imposed on other individuals. The law can and is used as an excuse to persecute gay people, even if it is seldom directly enforced.

[3] In an earlier challenge to § 21.06, Texas's attorney general offered a different defense of the law and did not claim that the statute promoted morality. *Baker v. Wade*, 553 F. Supp. 1121, 1142 n.55 (N.D. Tex. 1982) (quoting the brief filed by the attorney general), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986).

Section B argues that even if this Court were to conclude that respondent is entitled to express a moral judgment about homosexuality, § 21.06 would still fail scrutiny under the equal protection clause because it is not rationally related to achieving this purpose. The best evidence that the state's chosen means—criminalization—is not rationally related to its end is that the state rarely ever employs these means. Thus, because § 21.06 is not actually enforced, it operates only to express constitutionally impermissible animus. Yet given the nature of the acts involved, if Texas were permitted to enforce § 21.06 as a criminal statute, this would pose unacceptable risks that constitutionally repugnant behavior would occur in the course of enforcing the statute.

ARGUMENT

I. BECAUSE OF THE IMPORTANT INDIVIDUAL INTERESTS INVOLVED, THIS CASE CALLS FOR A LESS DEFERENTIAL FORM OF RATIONALITY REVIEW

In reviewing state action under the equal protection clause, this Court generally asks three questions: First, what is the basis on which the government has distinguished among individuals? Second, how weighty is the governmental interest purportedly served by the challenged law or practice? Third, how well does the challenged law or practice serve that interest?

The answer to the first question channels the second and third inquiries. In cases where the government has used a suspect or quasi-suspect criterion, such as race or sex, the challenged law will survive equal protection review only if it is closely related to a particularly significant government purpose.[4] By contrast, in cases that do not involve a suspect

[4] In cases involving racial classifications, this is generally expressed as requiring that the challenged measure be "narrowly tailored" to achieve

or quasi-suspect classification, or a restriction on a "fundamental" interest, the challenged law will survive as long as it is rationally related to a legitimate government purpose—a more deferential standard.

It would be a serious misreading of this Court's precedents to conclude that rationality review is invariably toothless. The Court has repeatedly struck down statutes using rationality review. See generally Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through *Romer v. Evans*, 32 Ind. L. Rev. 357, 370 (1999) (listing various examples); Suzanne B. Goldberg, Equality Without Tiers, 57 U. Miami L. Rev. ___ (2003) (same). Some of these laws have run afoul of the purpose prong of rationality review because they expressed nothing more than prejudiced or stereotypical thinking about the individuals involved. In other cases, where states were pursuing some legitimate purpose, classifications were nonetheless judged to be an ill-conceived means of achieving that end. And often both the means and the ends are deemed problematic: the cases in which the Court has most often found that laws fail rationality review are those in which concerns with the logic of a law's means reinforce questions about the legitimacy of its ends.[5]

"compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). In cases involving gender-based classifications, the defendant must provide an "exceedingly persuasive" justification for the challenged practice, *United States v. Virginia*, 518 U.S. 515, 533 (1996), by showing that the challenged law is at least "substantially related" to the achievement of "important governmental objectives," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

[5] Indeed, it is worth remembering that, until the emergence of three-tiered equal protection in the mid-1970's, the Court regularly employed the language of rationality review even in race and gender cases. See, e.g., *Anderson v. Martin*, 375 U.S. 399, 403 (1964) (striking down a statute that required a candidate's race be indicated on the ballot because it was not "reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates"); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (striking down a statute that automatically preferred male to female relatives as administrators of estates because it did not "bea[r] a rational relationship to a state objective" but instead "ma[d]e the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause").

A. This Court Has Been More Likely to Find Equal Protection Violations When Significant Liberty Interests Are Involved, Even When Those Interests Are Not Independently Considered to Be Fundamental

When the basis for a state's decision on how to classify individuals is not a suspect or quasi-suspect one, the nature of the interest at issue nonetheless helps to determine the nature of the Court's analysis. Where a state classification unequally burdens a right deemed by the Constitution to be fundamental, this Court applies heightened scrutiny. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (applying strict scrutiny under the equal protection clause to state laws that deny some citizens the right to vote). In the absence of such a fundamental right, the Court tends to defer to the state. Yet this Court's application of rationality review in equal protection cases has been noticeably more assertive where the classification at issue unequally restricts individuals' ability to participate fully in one of the particularly significant "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. at 631. This is true even when the interests involved are not themselves so "fundamental" as to require heightened protection against government restrictions that apply to all citizens alike.

In *Plyler v. Doe*, 457 U.S. 202 (1982), for example, this Court confronted a Texas statute that authorized local school districts to deny enrollment to children who were not legally admitted to the United States. The Court rejected the claim that "illegal aliens" are a suspect class entitled to heightened scrutiny. *Id.* at 219 n.19. It also recognized that public

education is not a fundamental "'right' granted to individuals by the Constitution." *Id.* at 221; see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973). Nonetheless, the Court struck down the statute as a violation of the equal protection clause, finding that the lasting impact on a child's life of denying him or her access to public education distinguished education "from other forms of social welfare legislation." *Plyler*, 457 U.S. at 221.

Plyler is one of a number of cases in which ideas of equality and liberty reinforce one another. Several of this Court's recent equal protection decisions follow a similar pattern, striking down governmental decisions as violations of the equal protection clause in part because of the importance of the underlying interest affected, even when that interest does not independently constitute a fundamental right. Most recently, in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), this Court held that Florida's use of different standards for counting ballots during a statewide recount violated the equal protection clause even though an "individual citizen has no federal constitutional right to vote for electors for the President of the United States." *Id.* at 104. While the abstract right to vote for electors was not itself a fundamental right, this Court held that once the legislature has provided for popular election, each voter is entitled to be treated with "equal dignity." *Id.*

In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), this Court addressed the constitutionality of a Mississippi statute that required appellants to prepay substantial costs in order to perfect civil appeals. The Court reiterated the longstanding rule that the Constitution does not "independently require that the State provide a right to appeal" judicial determinations. *Id.* at 120. But, as the Court explained, in cases "concerning access to judicial processes . . . . 'due process and equal protection principles converge.'" *Id.* (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)). In these cases, this Court's equal protection inquiry has repeatedly been

informed by the nature of the interest at issue in the underlying judicial proceeding. In *M.L.B.*, the underlying case involved a parental termination proceeding. The interest at issue was the appellant's relationship with her child. Because parental "termination decrees 'work a unique kind of deprivation,'" 519 U.S. at 127 (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981)), the Court held that it violated the equal protection clause to deny M.L.B. the ability to appeal enjoyed by non-indigent parents.

M.L.B.'s reliance on *Mayer v. City of Chicago*, 404 U.S. 189 (1971), see *M.L.B.*, 519 U.S. at 111-12 & 121-22, shows how other, seemingly less draconian, deprivations of liberty can also form the basis for finding equal protection violations. *Mayer* involved an impecunious medical student who was charged with disorderly conduct and interference with a police officer—two non-felony, non-jailable offenses. Mayer was convicted and given a $500 fine. He challenged the state's refusal to provide him with a free trial transcript. This Court held that the state's refusal to provide the transcript violated the equal protection clause. As the *M.L.B.* Court explained, even though Mayer faced no term of confinement, the conviction "could affect his professional prospects and, possibly, even bar him from the practice of medicine. . . . The State's pocketbook interest . . . was unimpressive when measured against the stakes for the defendant." *M.L.B.*, 519 U.S. at 121.

In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court struck down an application of a municipal zoning regime that treated group homes for the mentally retarded differently from other group living arrangements. It held that the city's decision reflected nothing beyond an "irrational prejudice against the mentally retarded," *id.* at 450, which negatively affected their undeniably important interest in living in the community, see *id.* at 438, 444 (opinion of

the Court); *id.* at 461 (Marshall, J., joined by Brennan and Blackmun, JJ.) (describing the importance of group homes to retarded individuals).

Finally, *Romer* itself offers a particularly salient example of the way in which the nature of the liberty interests at stake can inform rationality review under the equal protection clause. The provision this Court struck down—Colo. Const. Art. II, § 30b ("Amendment 2")—interfered with gay people's "right to seek specific protection from the law." *Romer*, 517 U.S. at 633. The way Amendment 2 foreclosed this right was to wipe out protections gay people and their allies had already achieved through the political system and to make future gains impossible. Thus, Amendment 2 impaired the ability of gay people to participate in one of the most protected aspects of "civic life in a free society," *id.* at 631—concerted political activity to persuade elected officials to adopt helpful policies. The impermissibility of the classification Colorado drew was driven home by the extraordinary way in which it disabled gay men, lesbians, and bisexuals.

The *Romer* decision also recognizes that gay people form an identifiable class that cannot constitutionally be targeted for status-based animus. *Id.* at 635. In so holding, the Court implicitly acknowledged that one's choice to identify as a gay person implicates some species of liberty interest. This Court was not required to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), to reach that conclusion. *Romer* is thus a good—but hardly the only—example of how this Court's rationality review varies with the importance of the individual interests involved.

In short, just as this Court's rationality review has been "especially deferential" in some contexts, such as "classifications made by complex tax laws," *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992), it has been noticeably more vigorous in contexts where the classification touches upon important individual interests. And *Romer* shows that one of those

contexts involves discrimination against gay men, lesbians, and bisexuals that touches on their ability to participate as equal citizens in daily life.

B. Statutes That Criminalize Private, Consensual Homosexual Activity Interfere With Significant Liberty Interests

The form Texas's prohibition on homosexual activity takes may look quite different from the Colorado provision that failed rationality review in *Romer*. But § 21.06 actually operates in a quite similar fashion. Like Amendment 2, § 21.06 strips gay men, lesbians, and bisexuals of "the safeguards that others enjoy or may seek without constraint," including "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631.

1. *Section 21.06 Interferes with the Intimate Relationships of Lesbians, Gay Men, and Bisexuals*

At the most basic level, § 21.06 denies gay men, lesbians, and bisexuals in Texas a right "taken for granted" by other people in Texas, "because they already have [it]," *Romer*, 517 U.S. at 631—the right to make decisions about the nature of their private, consensual sexual relationships with other adults free from state interference. Until recently, states that criminalized oral and anal sex did so without regard to the status or identity of the individuals involved. See Nan D. Hunter, Life After *Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 538-39 (1992). In 1974, Texas selectively repealed its pre-existing statute, which made it a felony for anyone in Texas—married or unmarried, gay or straight—to engage in private, consensual oral or anal sex with another adult. See Tex. Penal Code, art. 524 (adopted 1943). It replaced that provision with one that criminalizes particular acts only when engaged in by a distinct minority—those who could be expected to act with

partners of the same sex. The heterosexual majority, by contrast, has the right to engage in *precisely* the same acts—defined by Texas law as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object," Tex. Penal Code § 21.01(1)—without fear of criminal punishment and the ensuing civil and social disabilities that come from being branded a criminal.[6]

Section 21.06 is a paradigmatic example of the evil that concerned Justice Robert Jackson in his often-cited concurrence in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949):

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 112-13 (Jackson, J., concurring); *see also Hill v. Colorado*, 530 U.S. 703, 731 (2000); *Larson v. Valente*, 456 U.S. 228, 245-46 (1982); *Eisenstadt v. Baird*, 405 U.S. 438,

[6] The Texas statute differs in this significant respect from the Georgia statute at issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which applied to acts of oral or anal sex regardless of the identity of the participants. When confronted with a case where that statute was applied to participants of the opposite sex, the Georgia Supreme Court declared the statute unconstitutional in its entirety as a matter of state law, *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), and the Georgia Legislature did not attempt to replace the statute with one covering only homosexual activity.

454-55 (1972); cf. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.")

By interfering with the interest gay people share with all other adults in making choices about their private consensual sexual activity, § 21.06 also interferes with the relationships gay couples develop. As this Court has long acknowledged, sexual intimacy contributes to "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). This is true for gay people no less than for heterosexuals.

Gay people form couples and create families that engage in the full range of everyday activities, from the most mundane to the most profound. They shop, cook, and eat together, celebrate the holidays together, and share one another's families. They make financial and medical decisions for one another. They rely on each other for companionship and support. See generally *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989) (finding that a gay couple constituted a family). Many gay couples share "the duties and the satisfactions of a common home." *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977) (plurality opinion).[7]

Section 21.06 denies gay men and lesbians the discrete, undeniably important right all other adults in Texas enjoy to

[7] The *Moore* plurality's understanding of what "family" meant was informed by census data "bear[ing] out the importance of family patterns other than the prototypical nuclear family," including the fact that a rising number "of all families contained one or more members over 18 years of age, other than the head of household and spouse." *Id.* at 504 n.14. Similarly, this Court's consideration of § 21.06 should be informed by data from the 2000 census showing that nearly 43,000 same-sex couples live together in Texas.

control the nature of their intimate relationships. Because of this alone, § 21.06 warrants the kind of sensitive scrutiny that this Court accorded the state's practices in cases like *Plyler*, *Cleburne*, *M.L.B.*, and *Romer*. Yet this is not the sole liberty interest impacted by § 21.06.

2. *Section 21.06 Undermines the Parental Relationships of Lesbians, Gay Men, and Bisexuals*

This Court has long recognized that parents' relationships with their children are "undeniably important," *M.L.B.*, 519 U.S. at 117. Thus, under the equal protection clause, when states intrude on family relationships, this Court "has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion." *Id.* at 116.

Courts in most states have recognized that sexual orientation is unrelated to parenting ability. Thus, they have generally rejected the view that sexual orientation can be used to curtail a parent's relationship with his or her children. See William B. Rubenstein, Cases and Materials on Sexual Orientation and The Law 810-11 (2d ed. 1997); Developments in the Law—Sexual Orientation and The Law, 102 Harv. L. Rev. 1508, 1636 (1989).

However, courts in states with sodomy laws unreasonably rely on these laws to restrict parental rights. For example, in *Ex parte D.W.W.*, 717 So.2d 793 (Ala. 1998), the Alabama Supreme Court upheld restrictions on a divorced mother's visitation with her children. The trial court ordered that the mother's visits take place only under the supervision of the children's grandparents. Part of the court's basis for restricting the mother's visitation rights was the Court's observation that "the conduct inherent in lesbianism is illegal in Alabama. . . . R.W., therefore, is continually engaging in conduct that

violates the criminal law of this state." *Id.* at 796.[8] Similarly, in *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996), one of the bases for the trial court's determination to award custody to the father was the fact that the mother was in a "monogamous intimate relationship" with another woman. *Id.* at 1213. The trial court found that this conduct "demonstrates a lack of moral example to the child and a lack of moral fitness. This conduct is unlawful in the State of Utah." *Id.* And in *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985), the Virginia Supreme Court concluded that a gay father was unfit for joint custody because "the conduct inherent in the father's relationship is punishable as a class six felony" and his behavior meant that "the conditions under which this child must live daily are . . . unlawful." *Id.* at 694.

In these, and many similar cases, the mere existence of sodomy laws directly affected gay people's parenting rights.

3. *Section 21.06 Restricts Employment Opportunities For Lesbians, Gay Men, and Bisexuals*

The right of an individual "to engage in any of the common occupations of life" is part of the liberty guaranteed by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Even though access to government employment is not a fundamental right entitled to protection under the substantive component of the due process clause, it is nonetheless an important interest for many individuals. Here, too, statutes like § 21.06 have been used to restrict the opportunities of gay men, lesbians, and bisexuals.

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[8] The statute cited by the Court, Ala. Code 1975, § 13A-6-65(a)(3), defined the crime of "sexual misconduct" to include consensual "deviate sexual intercourse." Alabama defines "deviate sexual intercourse" to include "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another." Ala. Code 1975, § 13A-6-60(2).

The Dallas Police Department, for example, has had a policy of denying jobs to applicants who have engaged in violations of § 21.06, without regard to whether they have ever been charged with, or convicted of, any crime. See *City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. Ct. App. 1993). By contrast, the department did not disqualify from consideration heterosexual applicants who engaged in oral or anal sex.

Similarly, in *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc), the Eleventh Circuit concluded that the state attorney general could rescind a job offer to an attorney who had received excellent evaluations as a summer intern because she participated in a religious marriage ceremony with another woman. The court of appeals found the rescission justified because "reasonable persons may suspect that having a Staff Attorney who is part of a same-sex 'marriage' is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy." *Id.* at 1105 n.17. Thus, the court of appeals found it unnecessary to decide whether the plaintiff "has engaged in sodomy within the meaning of Georgia law." *Id.* The mere *existence* of a sodomy law became the legal justification for Shahar's discharge. See generally Diana Hassel, The Use of Criminal Sodomy Laws in Civil Litigation, 79 Tex. L. Rev. 813, 828-33, 835-38 (2001) (discussing cases in which courts or employers presume violations of sodomy statutes from a litigant's or applicant's sexual orientation); Christopher Leslie, Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws, 35 Harv. C.R.-C.L. L. Rev. 103 (2000) (discussing the various ways in which formally unenforced sodomy statutes lead to discriminatory treatment of gay people generally).

Moreover, individuals who are actually *convicted* of violating consensual sodomy statutes can find their ability to pursue their careers sharply curtailed by state licensing laws that deny individuals with criminal convictions, even convictions

for misdemeanors like § 21.06, the right to practice certain professions. In Texas, for example, persons convicted of violating § 21.06 may lose their license to practice as a physician or registered nurse, see Tex. Occupational Code, §§ 164.051(a)(2)(B), 301.409(a)(1)(B), or their jobs as school bus drivers, Tex. Educ. Code § 22.084(b),(d).

4. *Section 21.06 Threatens The Sanctity of the Homes of Lesbians, Gay Men, and Bisexuals*

An "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). This value finds its most explicit expression in the Fourth Amendment, which "reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). As this Court recently reemphasized, "[i]n the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo v. United States*, 533 U.S. 27, 37 (2001)

Fourth Amendment values not only play a role in deciding how police may conduct investigations. They also limit the conduct the state may criminalize. *Stanley v. Georgia*, 394 U.S. 557 (1969), shows that concerns about the privacy of the home can limit a state's ability to criminalize behavior that implicates an individual's "right to satisfy his intellectual and emotional needs in the privacy of his own home." *Id.* at 565. See *Paris Adult Theatre*, 413 U.S. at 66 (explaining that *Stanley* cannot be justified solely on the basis of First Amendment interests, since Stanley was charged with possession of constitutionally unprotected obscene materials). As this Court observed in *Paris Adult Theatre*, "marital intercourse on a street corner or a theater stage" is simply a

different act than sexual intimacy that takes place within the specially protected confines of the home. *Id.* at 66 n.13; see *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Statutes that make consensual homosexual conduct a crime even when it occurs within an individual's home clearly deny gay men, lesbians, and bisexuals the ability to pursue their most intimate relationships in the privacy of their own homes. Moreover, by making behavior in the home a crime, these statutes authorize wholesale intrusion into the homes of gay men, lesbians, and bisexuals, as *amici* explain in Section II.B.2 of this brief.

* * *

In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 S.A.L.R. (Const. Ct. Oct. 9, 1998) (No. 11/98) <http: www.law.wits.ac.za/judgements/1998/gayles.html>, Justice Albie Sachs of the South African Constitutional Court offered in his concurrence a particularly eloquent articulation of the relationship between liberty and equality that is also at issue here:

> The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behavior becomes the foundation for the repudiation of equality.

II. SECTION 21.06 IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST

Section 21.06 fails rationality review for at least two reasons. First, like the zoning decision in *Cleburne Living Center*, 473 U.S. at 450, or the constitutional provision in

Romer, 517 U.S. at 634, § 21.06 reflects nothing more than "irrational prejudice against," or "animosity toward the class of persons affected." Under the circumstances of this case, § 21.06 cannot reasonably be viewed as directed at a legitimate government interest in promoting private sexual morality. Second, even if this Court were to conclude that promotion of private sexual morality can serve as a legitimate government purpose, § 21.06 is not a permissible means for pursuing that goal. Like the statutes at issue in *Mayer*, *M.L.J.*, and *Stanley*, § 21.06 unjustifiably interferes with significant individual freedoms. Thus, this Court can strike down § 21.06 without deciding whether classifications based on sexual orientation are inherently suspect or quasi-suspect.[9]

A. Section 21.06 Does Not Serve a Legitimate Government Purpose

Respondent defends § 21.06 solely on the grounds that it reflects the Legislature's conclusion that sexual intimacy between same-sex partners is immoral. See Brief in Opposition at 16. But that bare assertion cannot end this Court's inquiry into the state's purpose, because not all moral judgments embody legitimate state goals. In particular, a so-called moral judgment that is utterly indistinguishable from "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer*, 517 U.S. at 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)). See also *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere

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[9] Of course, if this Court were to hold that § 21.06 should be subjected to heightened scrutiny under either the equal protection clause or the due process clause, *amici*'s argument would apply with even greater force.

public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."). When a challenged law or practice reflects "mere negative attitudes, or fear," *Cleburne Living Center*, 473 U.S. at 448, or is "inexplicable by anything but animus toward the class it affects," *Romer*, 517 U.S. at 632, it lacks a legitimate purpose.

While most criminal laws involve moral choices, in the mine run of cases, the moral intuition that drives the legislature to make particular behavior a crime involves some sense that the conduct at issue causes tangible harm. Put somewhat differently, in most cases, there is a clear answer to the question "*Why* does the legislature consider this conduct immoral?" beyond the blanket assertion "Because it does." The examples pointed to by the Texas Court of Appeals simply underscore this point. To say that "the Legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral," *Lawrence v. State*, 41 S.W.3d 349, 354 (Tex. Ct. App. 2001), ignores the fact that the legislature deemed those activities to be immoral for a reason. The obvious reason why the state outlaws murder is to protect the lives of potential victims. The reasons why states outlaw prostitution surely include the effects prostitution has on public order in neighborhoods where it occurs. Cf. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (finding that a city's zoning ordinance regarding the locations of adult theaters was designed to address various "secondary effects" such as increased crime, decreased retail trade and property values, and the quality of urban life).

As the decision in *Renton* suggests, even with respect to crimes that involve judgments about sexual morality, this Court has generally pointed to purposes beyond simple expressions of moral outrage. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (emphasis added) ("This and other public indecency statutes were designed to protect morals *and* public order."); *Michael M. v. Superior*

Court of Sonoma County, 450 U.S. 464, 469-70 (1981) (plurality opinion of Rehnquist, J.) (holding, after noting that legislators might have been concerned about "protecting young females from . . . the loss of 'chastity,' and . . . promoting various religious and moral attitudes towards premarital sex" that a California statutory rape law was properly sustained because of the state's strong interest in deterring teenage pregnancy). When those public effects are absent, this Court has been far more skeptical of the state's asserted interests. In *Stanley v. Georgia*, 394 U.S. 557 (1969), for example, the Court held that a state's power to punish the public distribution of constitutionally unprotected, obscene material did not permit it to punish the private possession of such material within an individual's home.

In this case, respondent points to no reason why private, consensual homosexual conduct between adults is immoral and should be made a crime. It does not argue that the conduct at issue harms third parties in some tangible fashion. It does not argue that private consensual homosexual conduct creates threats to public order or brings in its wake other criminal behavior. It does not argue that § 21.06 is tied to *any* concrete harm.[10] The obvious explanation for § 21.06 is that it reflects popular disapproval of gay people. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Respondent recognizes that after *Romer*, straightforward animus against gay men, lesbians, and bisexuals is impermissible. But it tries to distinguish § 21.06 by claiming Colorado's Amendment 2, was "based upon sexual *orientation*," Brief in Opposition at 18 (emphasis in original), while

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[10] Other criminal statutes, which apply to heterosexual and homosexual conduct alike, prohibit public sexual activity, Tex. Penal Code § 21.07(a)(2), nonconsensual sexual activity, *id.* § 22.011(a)(1), and sexual activity involving minors, *id.* §§ 22.011(a)(2), 21.11.

§ 21.06 "is directed at certain conduct, not at a class of people." *Id.* at 12. The fact that § 21.06 is phrased in terms of conduct does not undermine the conclusion that it targets—in a similar manner—the same class that was targeted in *Romer*. While the *Romer* Court referred to the class as "homosexual persons or gays and lesbians," Amendment 2 literally prohibited claims of protection based on "homosexual, lesbian or bisexual orientation, *conduct, practices or relationships*" as well. *Romer*, 517 U.S. at 624 (emphasis added).

Texas's attempt to call this a conduct regulation fails for another reason. The Eighth Amendment prohibits states from criminalizing a particular status in the absence of "any antisocial behavior." *Robinson v. California*, 370 U.S. 660, 666 (1962). Because a state therefore cannot make it a crime to "be gay," a state with that motive will try to circumvent the Constitution by crafting a law that makes it a crime to engage in behaviors correlated with being gay. That is in essence what Texas did here. But it is a charade the Court has not tolerated in other cases. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 227, 232 (1985) (finding that an Alabama statute that disenfranchised individuals convicted of certain misdemeanors of "moral turpitude" was in fact purposefully discriminatory because "the crimes selected for inclusion . . . were believed by the [drafters] to be more frequently committed by blacks"). Thus, § 21.06 fails a critical aspect of any rational basis test: it does not advance a legitimate state objective.

B. Even If This Court Were To Find the Presence of a Legitimate State Interest in This Case, Section 21.06 Still Would Not Be Rationally Related to Achieving That Purpose

Respondent itself acknowledges that not all penalties or burdens imposed on individuals who engage in homosexual

conduct can survive even rationality review. After arguing that the state has a legitimate interest in "implementing morality," it observes that

> A statute which, say, prohibited practicing homosexuals from attending public schools would not be rationally related to that permissible state goal, and would violate the Equal Protection Clause; but a statute imposing criminal liability upon only those persons who actually engage in homosexual conduct is perfectly tailored to implement the communal belief that the conduct is wrong and should be discouraged.

Brief in Opposition at 19. What respondent fails to recognize is that if the hypothetical school-exclusion statute is unconstitutional, it is not because it is less well tailored than § 21.06 to "implement[ing] the communal belief that the conduct is wrong and should be discouraged." Given the centrality of public education to one's membership in the community, surely exclusion of "practicing homosexuals"—a group essentially indistinguishable from "persons who engage in homosexual conduct"—would convey the communal belief that homosexuality is wrong quite well. And a statute prohibiting practicing homosexuals from attending public schools would seem to discourage homosexual conduct at least as much as the unenforced § 21.06 does. *Cf. Department of Housing and Urban Development v. Rucker*, 122 S.Ct. 1230, 1235 (2002) (finding that the threat of being evicted from public housing for drug-related conduct could help to deter such activity). Rather, the reason the hypothetical school-exclusion statute fails rationality review is because the price it exacts is unacceptably high. So too, making private, consensual homosexual conduct a crime is a constitutionally inappropriate means to any permissible end.

1. *Nonenforcement of Statutes Like Section 21.06 Transforms Them Into Expressions of Constitutionally Impermissible Animus*

The state of Texas rarely enforces § 21.06. Indeed, in a civil action challenging the constitutionality of § 21.06, Texas's highest court ruled that the plaintiffs lacked standing because they could show no threat of imminent enforcement. *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994). The court premised this conclusion on "the Attorney General's contention that § 21.06 has not been, and in all probability will not be, enforced against private consensual conduct between adults." *Id.*[11]

In light of the record of pervasive indifference to enforcement of § 21.06, it is impossible to credit respondent's assertion that the statute reflects a societal interest of any kind, moral or other, in preventing private, consensual sexual activity between same-sex partners. See *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting) ("To me the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time—in effect a right to hold this statute as an imminent threat to the privacy of the households of the State—conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the

[11] It is important to recognize that the reason Texas's Homosexual Conduct Law is seldom enforced is *not* because it is seldom violated. There are probably around one million gay or lesbian individuals in Texas. See *Baker v. Wade*, 553 F. Supp. at 1129 (explaining this estimate). Thus, there are millions of violations of § 21.06 every year. Nonetheless, the state apparently makes virtually no effort to detect and prosecute violations of § 21.06. In this case, for example, petitioners were discovered only because police officers went to petitioner Lawrence's house to investigate what turned out to be a criminally misleading report about a weapons disturbance.

means it has chosen for its effectuation as appropriate or necessary."). Indeed, in an earlier case challenging § 21.06, the Attorney General of Texas withdrew his appeal of a district court decision striking down § 21.06, leaving only a single county prosecutor to defend (successfully) the statute. See *Baker v. Wade*, 769 F.2d at 291.

But if the state makes virtually no effort to enforce the statute, the only explanation for its presence on the books is that it stays there to express animus against gay people. Given the way these laws function in society, see *supra* Section I.B., the government and the public read § 21.06 as an endorsement of discrimination against gay people. Thus, the major function § 21.06 serves is to brand all gay men and lesbians as immoral criminals.

Lest there be any doubt about this message, consider how the Texas law of defamation treats false allegations of homosexuality. In *Plumley v. Landmark Chevrolet*, 122 F.3d 308 (5th Cir. 1997), Hamilton, a salesman at the defendant truck dealership, called Plumley, a potential customer, a "fucking faggot." *Id.* at 310. In Plumley's subsequent slander suit, the Fifth Circuit held that Plumley was not required to prove special damages because "when Hamilton called Plumley a 'faggot,' Hamilton imputed the crime of sodomy to Plumley. Therefore, the alleged remark is slander per se," *id.* at 311. See also *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Ct. Civ. App. 1980) (calling someone "homosexual" or "queer" is slanderous per se because it imputes a crime even though that crime is not punishable by imprisonment). The Texas courts continue to this very day to equate being gay with being a criminal. See *Thomas v. Bynum*, 2002 WL 31829509 (Tex. Ct. App. 4th Dist., Dec. 18, 2002) (reaffirming *Head*).

Under these circumstances, the decision to keep § 21.06 on the books reveals that Texas is using the means of the criminal law not to interdict conduct but solely to make a statement that the Constitution does not permit the state to

make—namely that gay men, lesbians, and bisexuals are an inherently unworthy class "unequal to everyone else." *Romer*, 517 U.S. at 635.

2. *Vigorous Enforcement of Laws Like Section 21.06 Would Involve Constitutionally Repugnant Methods*

Although the means of the criminal law are rarely employed to enforce the edict of § 21.06, the availability of the awesome state power that flows from criminalizing particular behavior offers an alternative reason for striking down § 21.06. If the state can make private, consensual homosexual behavior a crime, then it can also deploy "all the incidental machinery of the criminal law, [including custodial] arrests, searches and seizures," *Poe v. Ullman*, 367 U.S. at 548 (Harlan, J., dissenting).

This Court's recent decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), drives home the dangers § 21.06 imposes. Like Mrs. Atwater, petitioners in this case were subjected to a custodial arrest, with the attendant loss of liberty and "pointless indignity," *id.* at 373 (O'Connor, J., dissenting), for a non-jailable offense. They were forced to spend the night in jail, despite the fact that the maximum statutorily authorized penalty for violating § 21.06 is a $500 fine. See Tex. Penal Code § 12.23. Their experience shows that law enforcement personnel or prosecutors who have the kind of "negative attitudes" or "irrational prejudice" that *Cleburne* held to be constitutionally illegitimate can unilaterally impose a punishment on gay people that the Texas Legislature never authorized. In short, as the title of Malcolm M. Feeley's classic book puts it, The Process Is The Punishment (1979). And because upholding § 21.06 necessarily requires holding that the state can treat gay men, lesbians and bisexuals differently from all other citizens, the fact that anti-gay prejudice motivated a particular officer or department's decision to enforce § 21.06 would be irrelevant. Cf. *Atwater*,

532 U.S. at 372 (O'Connor, J., dissenting) (explaining that "unbounded discretion" to carry out full custodial arrests "carries with it grave potential for abuse" and that "the relatively small number of published cases dealing with such arrests proves little and should provide little solace," especially given problems with discriminatory enforcement).

The commentary to the American Law Institute's Model Penal Code identified precisely these dangers several decades ago: to the extent that laws like § 21.06 "are enforced against private conduct between consenting adults, the result is episodic and capricious selection of an infinitesimal fraction of offenders for severe punishment. This invitation to arbitrary enforcement not only offends notions of fairness and horizontal equity, but it also creates unwarranted opportunity for private blackmail and official extortion." Model Penal Code §213.2 Comment 2 (1962, Comments Revised 1980).

If § 21.06 is a valid criminal statute, there are other perhaps even more constitutionally repugnant methods of enforcing the law than simply confining defendants overnight until they can be arraigned. As noted above, the 2000 U.S. Census reports nearly 43,000 same-sex cohabiting couples in Texas. A vindictive or bigoted law enforcement officer or prosecutor could perhaps quite easily establish probable cause to believe that these couples, or any openly gay or lesbian individuals, have engaged in violations of § 21.06, especially given the presumption, as a matter of Texas law, that homosexuals violate § 21.06. See, e.g., *Plumley*, 122 F.3d at 310; *Head v. Newton*, 596 S.W.2d at 210. If they can establish probable cause, police or prosecutors can obtain search warrants to enter individuals' homes and search their personal effects for incriminating evidence. In *Griswold*, 381 U.S. at 485-86, one of the considerations that influenced this Court's holding that Connecticut could not criminalize the use of contraceptives was the prospect that otherwise the Court would be required to "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," an

idea "repulsive to the notions of privacy surrounding the marriage relationship." The idea is no less repulsive if the police are searching the bedrooms of gay and bisexual individuals for telltale signs of sexual activity. As this Court recognized in *Kyllo*, 533 U.S. at 37, "[i]n the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes."

Other cases suggest that police might be justified in even more intrusive searches of individuals themselves. Courts of appeals have repeatedly recognized that body cavity searches and "strip searches involving the visual inspection of the anal and genital areas [are] demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (internal quotation marks omitted). See also *Blackburn v. Snow*, 771 F.2d 556, 564 (1st Cir. 1985); *Swain v. Spinney*, 117 F.3d 1, 6-7 (1st Cir. 1997). But they have nonetheless allowed them in a variety of circumstances. For example, in *Rodriques v. Furtado*, 950 F.2d 805, 810-11 (1st Cir. 1991), the court of appeals upheld a warrant authorizing a vaginal search for drugs in light of informants' statements that they had overheard the target saying that she sometimes hid drugs in her vagina. In *Salinas v. Breier*, 695 F.2d 1073, 1085 (7th Cir. 1982), *cert. denied*, 464 U.S. 835 (1983), the court of appeals held that the police were entitled to conduct strip and body cavity searches without warrants of an entire family taken into custody on the basis of an arrest warrant for the father because they had probable cause to believe that a controlled substance was hidden in at least *one* of the family members' rectums or vaginas. Most recently, in *United States v. Husband*, 2002 U.S. App. LEXIS 22851 (7th Cir., Nov. 4, 2002), the court of appeals upheld a search in which, after a suspect refused to open his mouth, the police had him anesthetized and rendered unconscious in order to remove evidence from his mouth. See also *Winston v. Lee*, 470 U.S.

753, 759, 760 (1985) (providing that "compelled surgical intrusion into an individual's body for evidence . . . . depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure").

The most objective physical evidence of a violation of § 21.06 would surely be the presence of the saliva or semen of one person on (or in) his or her partner's body. Forcing a suspect to submit to a strip search, cavity search, or other intrusion to retrieve this evidence, no matter how probative, of an act that Texas has chosen to treat as a misdemeanor subject to a $500 fine would be constitutionally repugnant. As the commentary to the Model Penal Code observes, "the methods available to the police for enforcing such laws involve tactics which are often unseemly, and which, by their very nature, stretch the limits of constitutionality." Model Penal Code §213.2 Comment 2 (1962, Comments Revised 1980). But the availability of such enforcement measures flows almost ineluctably from the conclusion that states can enforce notions of morality by criminalizing the harmless conduct at issue in this case. Though respondent has argued that it is entitled to make the moral choice that underlies § 21.06, nothing in its argument suggests that it should be entitled to deploy the full panoply of *criminal* law enforcement against citizens who have engaged in private, consensual homosexual acts. That is an irrational and impermissible response.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Texas Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

BRIEF OF PROFESSORS OF HISTORY GEORGE CHAUNCEY, NANCY F. COTT, JOHN D'EMILIO, ESTELLE B. FREEDMAN, THOMAS C. HOLT, JOHN HOWARD, LYNN HUNT, MARK D. JORDAN, ELIZABETH LAPOVSKY KENNEDY, AND LINDA P. KERBER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors and scholars who teach and write about history and are knowledgeable about the history of the treatment of lesbians and gay men in America. They are George Chauncey, Nancy F. Cott, John D'Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy, and Linda P. Kerber. Various *amici* have taught, conducted research, and published in the fields of the history of sexual regulation, including the history of sodomy laws; the history of discrimination based on sexuality, race, and gender; and American social and cultural history from the colonial period through the twentieth century. A summary of the qualifications and affiliations of the individual *amici* is provided in the appendix to this brief. *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici, as historians, do not propose to offer the Court legal doctrine to justify a holding that the Texas Homosexual Conduct Law violates the U.S. Constitution. Rather, *amici* believe they can best serve the Court by elaborating on two *historical* propositions important to the legal analysis: (1) no consistent historical practice singles out same-sex behavior as "sodomy" subject to proscription, and (2) the governmental policy of classifying and discriminating against certain citizens on the basis of their homosexual status is an unprecedented project of the twentieth

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

century, which is already being dismantled. The Texas law at issue is an example of such irrational discrimination.

In colonial America, regulation of non-procreative sexual practices – regulation that carried harsh penalties but was rarely enforced – stemmed from Christian religious teachings and reflected the need for procreative sex to increase the population. Colonial sexual regulation included such non-procreative acts as masturbation, and sodomy laws applied equally to male-male, male-female, and human-animal sexual activity. "Sodomy" was not the equivalent of "homosexual conduct." It was understood as a particular, discrete, act, not as an indication of a person's sexuality or sexual orientation.

Not until the end of the nineteenth century did lawmakers and medical writing recognize sexual "inversion" or what we would today call homosexuality. The phrase "homosexual sodomy" would have been literally incomprehensible to the Framers of the Constitution, for the very concept of homosexuality as a discrete psychological condition and source of personal identity was not available until the late 1800s. The Court in *Bowers* v. *Hardwick* misapprehended this history.

Proscriptive laws designed to suppress all forms of non-procreative and non-marital sexual conduct existed through much of the last millennium. Widespread discrimination against a class of people on the basis of their homosexual status developed only in the twentieth century, however, and peaked from the 1930s to the 1960s. Gay men and women were labeled "deviants," "degenerates," and "sex criminals" by the medical profession, government officials, and the mass media. The federal government banned the employment of homosexuals and insisted that its private contractors ferret out and dismiss their gay employees, many state governments prohibited gay people from being served in bars and restaurants, Hollywood prohibited the discussion of gay issues or the appearance of gay or lesbian characters in its films, and many municipalities launched police

campaigns to suppress gay life. The authorities worked together to create or reinforce the belief that gay people were an inferior class to be shunned by other Americans. Sodomy laws that exclusively targeted same-sex couples, such as the statute enacted in 1973 in Texas (1973 TEX. GEN. LAWS ch. 399, §§ 1, 3), were a development of the last third of the twentieth century and reflect this historically unprecedented concern to classify and penalize homosexuals as a subordinate class of citizens.

Since the 1960s, however, and especially since the *Bowers* decision in 1986, official and popular attitudes toward homosexuals have changed, though vestiges of old attitudes – such as the law at issue here – remain. Among other changes, the medical profession no longer stigmatizes homosexuality as a disease, prohibitions on employment of homosexuals have given way to antidiscrimination protections, gay characters have become common in movies and on television, 86 percent of Americans support gay rights legislation, and family law has come to recognize gays and lesbians as part of non-traditional families worthy of recognition. These changes have not gone uncontested, but a large majority of Americans have come to oppose discrimination against lesbians and gay men.

In this case, the Court should construe the Equal Protection Clause and the Due Process Clause with a thorough and nuanced history of the subject in mind.

ARGUMENT

I. *BOWERS* v. *HARDWICK* RESTS ON A FUNDAMENTAL MISAPPREHENSION OF THE HISTORY OF SODOMY LAWS

In *Bowers* v. *Hardwick*, this Court concluded, by a 5-4 vote, that the Constitution does not confer a fundamental right to engage in "homosexual sodomy." The majority's conclusion was based, in large measure, on the "ancient roots" of laws prohibiting homosexuals from engaging in acts of consensual

sodomy. 478 U.S. 186, 192 (1986). The Court stated that in 1791 "sodomy" "was forbidden by the laws of the original thirteen States," that in 1868 "all but 5 of the 37 States in the Union had criminal sodomy laws," and that, "until 1961, all 50 States outlawed sodomy." *Id.* at 192-193. Accordingly, the Court reasoned, the right of homosexuals to engage consensually in the acts that have been labeled "sodomy" is not "deeply rooted in this Nation's history and tradition." *Id.* at 192-194. In a concurring opinion, Chief Justice Burger relied on a similar historical interpretation. In his view, "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization." *Id.* at 196. To consider the right to engage in homosexual sodomy a fundamental right, Chief Justice Burger wrote, "would be to cast aside millennia of moral teaching." *Id.* at 197.

Recent historical scholarship demonstrates the flaws in the historical accounts endorsed by the Court and Chief Justice Burger. We concur with the accounts given of the history of sodomy laws and of their enforcement in colonial America and the United States by the American Civil Liberties Union and the Cato Institute in their amicus briefs. We will not endeavor to replicate their historical accounts here, but we do wish to stress two points about this history.

First, contrary to the Court's assumption in *Bowers*, sodomy prohibitions have varied enormously in the last millennium (and even since our own colonial era) in their definition of the offense and in their rationalization of its prohibition. The specification of "homosexual sodomy" as a criminal offense does not carry the pedigree of the ages but is almost exclusively an invention of the recent past.

Prohibitions against sodomy are rooted in the teachings of Western Christianity, but those teachings have always been strikingly inconsistent in their definition of the acts encompassed by the term. When the term "sodomy" was first empha-

sized by medieval Christian theologians in the eleventh century, they applied it inconsistently to a diverse group of non-procreative sexual practices. In subsequent Latin theology, canon law, and confessional practice, the term was notoriously confused with "unnatural acts," which had a very different origin and ranged even more widely (to include, for example, procreative sexual acts in the wrong position or with contraceptive intent). "Unnatural acts" is the older category, because it comes directly from Paul in *Romans* 1, but Paul does not associate such acts with (or even mention) the story of Sodom (*Genesis* 19) and appears not to have considered that story to be concerned with same-sex activity. (Cf. *Ezekiel* 16:49-50, where the sin of Sodom is the arrogant and inhospitable refusal to share wealth and leisure.)

Later Christian authors did combine *Romans* 1 with *Genesis* 19, but they could not agree on what sexual practices were meant by either "unnatural acts" or "sodomy." For example, in Peter Damian, who around 1050 championed the term "sodomy" as an analogy to "blasphemy," the "sins of the Sodomites" include solitary masturbation. In Thomas Aquinas, about two centuries later, "unnatural acts" cover every genital contact intended to produce orgasm except penile-vaginal intercourse in an approved position. See MARK D. JORDAN, THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY 46, 144-145 (1997). Many later Christian writers denied that women could commit sodomy at all; others believed that the defining characteristic of unnatural or sodomitic sex was that it could not result in procreation, regardless of the genders involved. See MARK D. JORDAN, THE SILENCE OF SODOM 62-71 (2000). In none of these authors does the term "sodomy" refer systematically and exclusively to same-sex conduct. Certainly it was not used consistently through the centuries to condemn that conduct. The restrictive use of the term in the Texas law at issue must itself be regarded as a historically recent innovation.

The English Reformation Parliament of 1533 turned the religious injunction against sodomy into the secular crime of buggery when it made "the detestable and abominable vice of buggery committed with mankind or beast" punishable by death. The English courts interpreted this to apply to sexual intercourse between a human and animal and anal intercourse between a man and woman as well as anal intercourse between two men. See William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1012 (1997); Ed Cohen, *Legislating the Norm: From Sodomy to Gross Indecency*, 88 S. ATLANTIC Q. 181, 185 (1989).

Colonial American statutes variously drew on the religious and secular traditions and shared their imprecision in the definition of the offense. Variously defining the crime as (the religious) sodomy or (the secular) buggery, they generally proscribed anal sex between men and men, men and women, and humans and animals, but their details and their rationale varied, and the New England colonies penalized a wider range of "carnall knowledge," including (but by no means limited to) "men lying with men." Puritan leaders in the New England colonies were especially vigorous in their denunciation of sodomitical sins as contrary to God's will, but their condemnation was also motivated by the pressing need to increase the population and to secure the stability of the family. Thus John Winthrop mused that the main offense of one man hanged in New Haven in 1646 for having engaged in masturbation with numerous youths – not, in other words, for "sodomy" as it is usually understood today – was his "frustratinge of the Ordinance of marriage & the hindringe the generation of mankinde." See John Murrin, *"Things Fearful to Name": Bestiality in Early America*, *in* AMERICAN SEXUAL HISTORIES 17 (Elizabeth Reis ed., 2001); see also Robert F. Oaks, *"Things Fearful to Name": Sodomy and Buggery in Seventeenth-century New England*, 12 J. SOC.

HIST. 268 (1978); JONATHAN NED KATZ, *The Age of Sodomitical Sin, 1607-1740, in* GAY/LESBIAN ALMANAC 23 (1983).

Another indication that the sodomy statutes were not the equivalent of a statute against "homosexual conduct" is that with one brief exception they applied exclusively to acts performed by men, whether with women, girls, men, boys, or animals, and not to acts committed by two women. Only the New Haven colony penalized "women lying with women," and this for only ten years. For the entire colonial period we have reports of only two cases involving two women engaged in acts with one another. As one historian notes, both cases "were treated as lewd and lascivious behavior, not as potential crimes against nature." See Murrin at 15; KATZ, GAY/LESBIAN ALMANAC, at 29-30.

Statutes enacted in the early decades after independence followed the English authorities, but by the mid-nineteenth century most statutes defined the offense as a crime against nature rather than as a crime against God. Such statutes were still not the equivalent of a statute proscribing "homosexual conduct." In 1868, no statute criminalized oral sex, whether between two men, two women, or a man and woman. See William Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 656.

It was only beginning in the 1970s that a handful of States, including Texas, passed legislation specifying homosexual sodomy while decriminalizing heterosexual sodomy. This legislation had no historical precedent, but resulted from a uniquely twentieth-century form of animus directed at homosexuals, which will be detailed in the next section of this brief.

Second, throughout American history, the authorities have rarely enforced statutes prohibiting sodomy, however defined. Even in periods when enforcement increased, it was rare for people to be prosecuted for consensual sexual relations conduct-

ed in private, even when the parties were of the same sex. Indeed, records of only about twenty prosecutions and four or five executions have surfaced for the entire colonial period. Even in the New England colonies, whose leaders denounced "sodomy" with far greater regularity and severity than did other colonial leaders and where the offense carried severe sanctions, it was rarely prosecuted. The trial of Nicholas Sension, a married man living in Westhersfield, Connecticut, in 1677, revealed that he had been widely known for soliciting sexual contacts with the town's men and youth for almost forty years but remained widely liked. Likewise, a Baptist minister in New London, Connecticut, was temporarily suspended from the pulpit in 1757 because of his repeatedly soliciting sex with men, but the congregation voted to restore him to the ministry after he publicly repented. They understood his sexual transgressions to be a form of sinful behavior in which anyone could engage and from which anyone could repent, not as a sin worthy of death or the condition of a particular class of people. See Richard Godbeer, *"The Cry of Sodom": Discourse, Intercourse, and Desire in Colonial New England*, 3.52 WM. & MARY Q. 259, 259-260, 275-278 (1995); Eskridge, 1999 U. ILL. L. REV. at 645; JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 30 (2d ed. 1997).

The relative indifference of the public and the authorities to the crime of sodomy continued in the first century of independence. For instance, only twenty-two men were indicted for sodomy in New York City in the nearly eight decades from 1796 to 1873. D'EMILIO & FREEDMAN, INTIMATE MATTERS 123. The number of sodomy prosecutions increased sharply in the last two decades of the nineteenth century and in the twentieth century. This was made possible by the decision of many States to criminalize oral intercourse for the first time. But it resulted in large measure from the pressure applied on district attorneys by privately organized and usually religiously inspired anti-vice societies, whose leaders feared that the growing size and

complexity of cities had loosened the constraints on sexual conduct and increased the vulnerability of youth and the disadvantaged. The increase in sodomy prosecutions was only one aspect of a general escalation in the policing of sexual activity, which also included stepped-up campaigns against prostitution, venereal disease, and contraception use. Although in this context a growing number of sodomy prosecutions involved adult males who had engaged in consensual relations, most such relations had taken place in semi-public spaces rather than in the privacy of the home, and the great majority of cases continued to involve coercion and/or minor boys or girls. See D'EMILIO & FREEDMAN, INTIMATE MATTERS 150-156, 202-215; GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 137-141 (1994); PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920 (1978); Eskridge, 1999 U. ILL. L. REV. at 655-659.

Thus, the majority in *Bowers* misinterpreted the historical record. Laws singling out sexual (or "sodomitical") conduct between partners of the same sex for proscription are an invention of our time, not the legacy of "millennia of moral teaching." And in practice, regulating sodomy has never been a major concern of the state or the public.

When reexamining a prior holding, this Court ordinarily considers "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 855 (1992). See also *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 574-575 (1993) (Souter, J., concurring in part) (arguing that recent historical scholarship correcting incomplete historical assessments by the Court justifies reexamination of constitutional precedent). Because, in this case, historical scholarship demonstrates that the use of sodomy laws to regulate exclusively same-sex behavior and to restrict

homosexuals is a recent invention, this Court should reconsider its earlier opinion in *Bowers*, which rested on an inaccurate historical assessment. And, at the very least, it should recognize that Texas's singling out of same-sex sodomy for prohibition lacks a significant historical pedigree.

Furthermore, in its analysis of the Equal Protection Clause issue in this case, the Court should recognize what the foregoing history shows: sodomy laws have not only varied in content over time, but have also depended on the kinds of status-based distinctions and shifting justifications that are typical of irrational discrimination. Neither millennia of moral teachings nor the American experience teach *any* consistent message about which sexual practices between consenting adults should be condemned and why. Rather, the unprecedented enactment in recent decades of sodomy laws that exclusively penalize homosexual conduct is one indication of the growth of a uniquely twentieth-century form of discrimination.

II. DISCRIMINATION ON THE BASIS OF HOMOSEXUAL STATUS WAS AN UNPRECEDENTED DEVELOPMENT OF THE TWENTIETH CENTURY

Over the generations, sodomy legislation proscribed a diverse and inconsistent set of sexual acts engaged in by various combinations of partners. Above all, it regulated *conduct* in which *anyone* (or, at certain times and in certain places, any male person) could engage. Only in the late nineteenth century did the idea of the homosexual as a distinct category of person emerge, and only in the twentieth century did the state begin to classify and penalize citizens on the basis of their identity or *status* as homosexuals. The States began to enact discriminatory measures in the 1920s and 1930s, but such measures and other forms of anti-gay harassment reached a peak in the twenty years following the Second World War, when government agencies systematically discriminated against homosexuals.

The unprecedented decision of Texas and several other states, primarily in the 1970s, to enact sodomy laws singling out "homosexual sodomy" for penalty, is best understood historically in the context of these discriminatory measures. The new sodomy laws essentially recast the historic purpose of such laws, which had been to regulate conduct generally, by adding them to the array of discriminatory measures directed specifically against homosexuals. Such discriminatory measures against homosexuals, although popularly imagined to be longstanding, are in fact not ancient but a unique and relatively short-lived product of the twentieth century.

It was only in the late nineteenth century that the very concept of the homosexual as a distinct category of person developed. The word "homosexual" appeared for the first time in a German pamphlet in 1868, and was introduced to the American lexicon only in 1892. JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 10 (1995).[2] As Michel Foucault has famously described this evolution, "the sodomite had been a temporary aberration; the homosexual was now a species." 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 43 (Robert Hurley trans. 1978).

The discriminatory measures we will describe responded to the growing visibility of gay and lesbian subcultures in American cities in the late nineteenth and early twentieth centuries. It should be noted, though, that many Americans responded to gay life with fascination and sympathy. Many people regarded the increasing visibility of gay life as simply one more sign of the growing complexity and freedom from tradition of a burgeoning metropolitan culture. Thousands of New Yorkers attended the drag balls organized by gay men in Harlem in the 1920s and 30s, for instance, and two of the most

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[2] For a detailed philological explication, see DAVID HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15 & n.155 (1990).

successful nightclubs in Times Square in 1931 featured openly gay entertainers. See CHAUNCEY, GAY NEW YORK 258, 320.

Others regarded the growing visibility of lesbian and gay life with dread. Hostility to homosexuals was sometimes motivated by an underlying uneasiness about the dramatic changes underway in gender roles at the turn of the last century. Conservative physicians initially argued that the homosexual (or "sexual invert") was characterized as much by his or her violation of conventional gender roles as by specifically sexual interests. At a time when many doctors argued that women should be barred from most jobs because employment would interfere with their ability to bear children, numerous doctors identified women's challenges to the limits placed on their sex as evidence of a medical disorder. Thus doctors explained that "the female possessed of masculine ideas of independence" was a "degenerate" and that "a decided taste and tolerance for cigars, * * * [the] dislike and incapacity for needlework * * * and some capacity for athletics" were all signs of female "sexual inversion." George Chauncey, *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, SALMAGUNDI, Fall 1982/Winter 1983, at 114, 120-121 (quoting HAVELOCK ELLIS, SEXUAL INVERSION (3d rev. ed. 1915); see *ibid.* (citing W.L. Howard, *Effeminate Men and Masculine Women*, N.Y. MEDICAL J. 71 (1900)). Similarly, another doctor thought it significant that a male "pervert" "never smoked and never married; [and] was entirely averse to outdoor games." *Id.* at 120 (quoting W.C. Rivers, *A New Male Homosexual Trait (?)*, ALIENIST & NEUROLOGIST 41 (1920)). See also Charles Rosenberg & Carroll Smith-Rosenberg, *The Female Animal: Medical and Biological Views of Women*, 60 J. AM. HISTORY 332 (1973).

Such views lost their credibility once public opinion had come to accept significant changes in women's roles in the workplace and political sphere, but doctors continued for several

more decades to identify homosexuality per se as a "disease," "mental defect," "disorder," or "degeneration." Until the American Psychiatric Association removed homosexuality from its list of disorders in 1973, such hostile medical pronouncements provided a powerful source of legitimation to anti-homosexual sentiment, just as medical science had previously legitimized widely held (and subsequently discarded) beliefs about male superiority and white racial superiority. See Chauncey, SALMAGUNDI at 129, 133, 137, 141; Siobhan Somerville, *Scientific Racism and the Invention of the Homosexual Body*, *in* QUEER STUDIES 241 (Beemyn & Eliason eds., 1996); D'EMILIO & FREEDMAN, INTIMATE MATTERS 122, 226; JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY (1999).

Anti-vice societies organized in the late nineteenth century also opposed the growing visibility of homosexuality, which they regarded as an egregious sign of the loosening of social controls on sexual expression in the cities. They encouraged the police to step up harassment of gay life as simply one more part of their campaigns to shut down dance halls and movie theaters, prohibit the consumption of alcohol and the use of contraceptives, dissuade restaurants from serving an interracial mix of customers, and otherwise impose their vision of the proper social order and sexual morality. As a result of this pressure, the police began using misdemeanor charges, such as disorderly conduct, vagrancy, lewdness, loitering, and so forth to harass homosexuals. These state misdemeanor or municipal offense laws, which carried fewer procedural protections, allowed further harassment of individuals engaged in same-sex intimacy. See D'EMILIO & FREEDMAN, INTIMATE MATTERS 150-156, 202-215; CHAUNCEY, GAY NEW YORK 137-141, 183-186, 197-198, 249-250; BOYER, URBAN MASSES 191-219.

In some cases, state officials tailored these laws to strengthen the legal regulation of homosexuals. For example, in 1923

the New York State legislature specified for the first time one man's "frequent[ing] or loiter[ing] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" as a form of disorderly conduct. CHAUNCEY, GAY NEW YORK 172. Many more men were arrested and prosecuted under this misdemeanor charge than for sodomy. Between 1923 and 1967, when Mayor John Lindsay ordered the police to stop using entrapment to secure arrests of gay men, more than 50,000 men had been arrested on this charge in New York City alone. George Chauncey, *A Gay World, Vibrant and Forgotten*, N.Y. TIMES, June 26, 1994, at E17.

Even this stepped-up policing of gay life fails to anticipate the scale of the discrimination against homosexuals put in place in the twentieth century, especially between the 1930s and 1960s. In the early years of the Great Depression, restrictions on gay life intensified. New regulations curtailed gay people's freedom of association. In New York State, for instance, the State Liquor Authority established after the Repeal of Prohibition issued regulations prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from employing or serving homosexuals or allowing homosexuals to congregate on their premises. CHAUNCEY, GAY NEW YORK 173, 337. The Authority's rationale was that the mere presence of homosexuals made an establishment "disorderly," and when the courts rejected that argument the Authority began using evidence of unconventional gender behavior or homosexual solicitation gathered by plainclothes investigators to provide proof of a bar's disorderly character. *Id.* at 337. Hundreds of bars were closed in the next thirty years in New York City alone. *Id.* at 339.

Similar regulations were introduced around the country in subsequent years. In California in the 1950s, notes one historian, the Alcoholic Beverage Control Board "collapsed the difference between homosexual status (a state of being) and conduct (behavior) and suggested that any behavior that

signified homosexual status could be construed as an illegal act. Simple acts such as random touching, mannish attire (in the case of lesbians), limp wrists, high pitched voices, and/or tight clothing (in the case of gay men) became evidence of a bar's dubious character" and grounds for closing it. NAN ALAMILLA BOYD, WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO (forthcoming 2003) (manuscript at 159). For similar policies elsewhere, see, *e.g.*, ELIZABETH LAPOVSKY KENNEDY & MADELINE DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY 145-146 (1993).

Other regulations curtailed gay people's freedom of speech and the freedom of all Americans to discuss gay issues. The Hollywood studios, under pressure from a censorship movement led by religious (primarily Catholic) leaders, established a production code that from 1934 on prohibited the inclusion of gay or lesbian characters, discussion of homosexual issues, or even the "inference" of "sex perversion" in Hollywood films. This censorship code remained in effect for some thirty years and effectively prohibited the discussion of homosexuality in the most important medium of the mid-twentieth century. See CHAUNCEY, GAY NEW YORK 353 & n.57. See generally GREGORY BLACK, THE CATHOLIC CRUSADE AGAINST THE MOVIES, 1940-1975 (1997); GREGORY D. BLACK, HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES (1994); VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (1991).

The persecution of gay men and lesbians dramatically increased at every level of government after the Second World War. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay persons in the State Department, the Senate conducted a special investigation into "the employment of homosexuals and other sex perverts in government." S. REP. NO. 241 (1950). The Senate Committee recommended excluding gay men and lesbians from all government service

because homosexual acts violated the law. *Id.* at 3. The Committee also cited the general belief that "those who engage in overt acts of perversion lack the emotional stability of normal persons," *id.* at 4, and that homosexuals "constitute security risks," *id.* at 5.[3] It also portrayed homosexuals as predators: "[T]he presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control. * * * One homosexual can pollute a Government office." *Id.* at 4.

The Senate investigation and report were only one part of a massive anti-homosexual campaign launched by the federal government after the war. The Senate Committee reported that "[a] spot check of the records of the Civil Service Commission indicates that between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion." S. REP. 241 at 9. In 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE

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[3] As historian David Johnson noted, however, the Senate Committee "could only uncover one example of a homosexual who was blackmailed into betraying his country, and for that, investigators had to reach back to World War I and beyond America's shores, to a Captain Raedl, chief of the Australian Counterintelligence Service in 1912." David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, WASH. HISTORY, Fall/Winter 1994-95, at 45, 48.

UNITED STATES, 1940-1970, at 44 (1983). Thousands of men and women were discharged or forced to resign from civilian and military positions because they were suspected of being gay or lesbian. *Ibid.*; ROBERT D. DEAN, IMPERIAL BROTHERHOOD: GENDER AND THE MAKING OF COLD WAR FOREIGN POLICY (2001).

In addition, President Eisenhower's executive order required defense contractors and other private corporations with federal contracts to ferret out and discharge their homosexual employees. David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, WASH. HISTORY, Fall/Winter 1994-95, at 45, 53. "Other private industries adopted the policies of the federal government * * * even though they had no direct federal contracts." *Ibid.* Furthermore, the FBI initiated a widespread system of surveillance to enforce the executive order. As one historian has noted, "The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued. Regional FBI officers gathered data on gay bars, compiled lists of other places frequented by homosexuals, and clipped press articles that provided information about the gay world. * * * Federal investigators engaged in more than fact-finding; they also exhibited considerable zeal in using information they collected." D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 46-47.

The official harassment of homosexuals received further legitimation from a series of press and police campaigns in the 1930s, 1940s, and 1950s that fomented demonic stereotypes of homosexuals as child molesters. "Despite the lack of evidence that the incidence of rape, child murder, or minor sex offenses had increased," these press campaigns "led to demands that the state crack down on sex crimes." Estelle Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HISTORY 83, 92 (1987). See also George

Chauncey, *The Postwar Sex Crime Panic, in* TRUE STORIES FROM THE AMERICAN PAST 172 (William Graebner ed., 1993). "The majority of cases of child 'sex murders' reported by the press involved men attacking girls. But * * * numerous articles warned that in breaking with social convention to the extent necessary to engage in homosexual behavior, a man had demonstrated the refusal to adjust to social norms that was the hallmark of the psychopath * * *." CHAUNCEY, GAY NEW YORK 359. "As a result of such press campaigns, the long-standing public image of the queer as an effeminate fairy whom one might ridicule but had no reason to fear was supplemented by the more ominous image of the queer as a psychopathic child molester capable of committing the most unspeakable crimes against children." *Id.* at 359-360.

The new demonic stereotypes of homosexuals were used to justify draconian legislation. See Chauncey, *Sex Crime Panic* at 169, 171. In response to the public hysteria incited by such press campaigns, more than half the state legislatures enacted laws allowing the police to force persons who were convicted of certain sexual offenses, including sodomy – or, in some States, merely suspected of being "sexual deviants" – to undergo psychiatric examinations. The examinations could result in indeterminate civil confinements for individuals deemed in need of a "cure" for their homosexual "pathology." See Freedman, 74 J. AM. HISTORY at 95-98; Chauncey, *Sex Crime Panic* at 166-167, 177; MARC STEIN, CITY OF SISTERLY AND BROTHERLY LOVES: LESBIAN AND GAY PHILADELPHIA, 1945-1972, at 124-125 (2000).

The government campaign against lesbians and gay men was waged at the local level as well. "The labeling of homosexuals as moral perverts and national security risks, along with the repressive policies of the federal government, encouraged local police forces across the country to harass them with impunity." D'EMILIO & FREEDMAN, INTIMATE MATTERS

293. In the decade following World War II, the police departments of numerous cities stepped up their raids on bars and private parties attended by gay and lesbian persons, and made thousands of arrests for "disorderly conduct." "Arrests were substantial in many cities. In the District of Columbia they topped 1,000 per year during the early 1950s; in Philadelphia, misdemeanor charges against lesbians and homosexuals averaged 100 per month. * * * New York, New Orleans, Dallas, San Francisco and Baltimore were among the cities that witnessed sudden upsurges in police action against homosexuals and lesbians in the 1950s." John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America, in* PASSION AND POWER: SEXUALITY IN HISTORY 231 (Peiss & Simmons eds., 1989).

In some parts of the country, hostility to gay men approached hysteria. In 1955, for example, there was an extensive investigation of gay men in Boise, Idaho. Fourteen hundred people were interrogated and coerced into identifying the names of other gay residents. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 51; JOHN GERASSI, THE BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY (1966).

Countless state employees, teachers, hospital workers, and others lost their jobs as a result of official policy. Beginning in 1958, for instance, the Florida Legislative Investigation Committee, which had been established by the legislature in 1956 to investigate and discredit civil rights activists, turned its attention to homosexuals working in the State's universities and public schools. Its initial investigation of the University of Florida resulted in the dismissal of fourteen faculty and staff members, and in the next five years it interrogated some 320 suspected gay men and lesbians. It "pressured countless others into relinquishing their teaching positions, and had many students quietly removed from state universities." Stacy Braukman, *"Nothing Else Matters But Sex": Cold War Narra-*

tives of Deviance and the Search for Lesbian Teachers in Florida, 1959-1963, 27 FEMINIST STUDIES 553, 555 (2001); see also *id.* at 553-557, 573 & n.3. Its 1959 report to the legislature called the extent of homosexual activity in the State's school system "absolutely appalling." *Id.* at 561. See also James A. Schnur, *Closet Crusaders: The Johns Committee and Homophobia, 1956-1965, in* CARRYIN' ON IN THE LESBIAN AND GAY SOUTH 132-163 (John Howard ed., 1997).

Lesbians, gay men, and their supporters challenged police harassment and state discrimination throughout this period, but with little success before the 1960s and 1970s. Through much of the twentieth century, gay men and lesbians suffered under the weight of medical theories that treated their desires as a disorder, penal laws that condemned their sexual behavior as a crime, and federal policies and state regulations that discriminated against them on the basis of their homosexual status. These state practices and ideological messages worked together to create or reinforce the belief that gay persons were an inferior class to be shunned by other Americans. Such forms of discrimination, harassment, and stigmatization were so pervasive and well established by the 1960s that it was widely imagined that they were the inevitable "residue of an age-old, unchanging social antipathy toward homosexuality." CHAUNCEY, GAY NEW YORK 355. But recent historical scholarship tells a different story. Discrimination on the basis of homosexual status was a powerful but unprecedented development of the twentieth century. Public conceptions and attitudes had changed, and they would change again.

III. TOLERANCE TOWARD HOMOSEXUALS HAS INCREASED, RESULTING IN ACCEPTANCE BY MANY, BUT NOT ALL, MAINSTREAM INSTITUTIONS

Since the 1960s, official and popular attitudes toward homosexuals have changed significantly, with a dramatic attitudinal shift since *Bowers* was decided in 1986. Homosexuality remains a contentious moral and political issue and we still live with the legacy of the many discriminatory measures put in place between the 1930s and 1960s, but a significant number of those measures have been repealed in recent years as large segments of the American public have become more understanding and accepting of lesbians and gay men.

The widespread consensus in the first half of the twentieth century that homosexuality was pathological and dangerous has given way, with growing numbers of expert and ordinary Americans regarding it as a normal and benign variation of human sexuality. Major institutions that once helped legitimize anti-gay hysteria have changed their positions. Medical writers and mental health professionals whose stigmatization of homosexuality as a disease or disorder had been used to justify discrimination for decades – as discussed in Part II above – were among the first to change their views. In 1973, the American Psychiatric Association voted to remove homosexuality from its list of mental disorders. Gary B. Melton, *Public Policy and Private Prejudice*, 44 AM. PSYCHOLOGIST 933, app. A, at 936 (1989) (citing Resolution of the American Psychiatric Association, Dec. 15, 1973). The American Psychological Association and the American Medical Association soon followed suit. See Resolution of the Council of Representatives of the American Psychological Association, 30 AM. PSYCHOLOGIST 633 (1975).

Religious attitudes toward homosexuals and homosexuality also began to change. The place of lesbians and gay men in religious life is still vigorously debated, but since the 1970s many mainline Protestant denominations have issued official statements condemning legal discrimination against homosexuals and affirming that homosexuals ought to enjoy equal protection under criminal and civil law. Several of these groups descended from the historically influential denominations whose

religious authority had been invoked to justify colonial statutes against sodomy. Early statements include those by the Lutheran Church in America (1970), the Unitarian Universalist Association (1970), the United Methodist Church (1972), the United Church of Christ (1975), the Protestant Episcopal Church (1976), the Disciples of Christ (1977), the United Presbyterian Church in the U.S.A. (1978), and the American Lutheran Church (1980).[4]

The federal government, which once prohibited the employment of homosexuals, now prohibits its agencies from discriminating against them in employment. The U.S. Civil Service Commission lifted its ban on the employment of gay men and lesbians in 1975. D'EMILIO & FREEDMAN, INTIMATE

[4] Statements in support of equal legal protection for homosexual persons were also adopted by the Central Conference of American Rabbis and the Union of American Hebrew Congregations as early as 1977. See Lutheran Church in America, Social Statement: Sex, Marriage, and Family (5th Biennial Convention 1970); United Methodist Church, Revision of "Social Principles" (Gen. Conf. 1972), codified in Book of Discipline of the United Methodist Church ¶ 162H (2000); United Church of Christ, Pronouncement on Civil Liberties Without Discrimination Related to Affectional or Sexual Preference (10th General Synod 1975); Protestant Episcopal Church (now Episcopal Church), Resolution A-71: Support Right of Homosexual to Equal Protection of the Law (65th Gen. Conv. 1976), *in* Journal of the General Convention of The Episcopal Church, Minneapolis 1976, at C-109 (1977); Christian Church (Disciples of Christ), Resolution 7747 (Gen. Assembly 1977); 1 United Presbyterian Church in the U.S.A. (now Presbyterian Church [U.S.A.]), Minutes of the 190th General Assembly 265-266 (1978); American Lutheran Church, Human Sexuality and Sexual Behavior G(5) (10th Gen. Conv. 1980); Central Conference of American Rabbis, Resolution on "Rights of Homosexuals" (88th Ann. Conf. 1977); Union of American Hebrew Congregations, Resolution on "Human Rights of Homosexuals" (54th Gen. Assembly 1977).

MATTERS 324. President Clinton signed executive orders banning discrimination in the federal workplace on the basis of sexual orientation, Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998), and barring the use of sexual orientation as a criterion for determining security clearance, Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 2, 1995). Hundreds of companies have adopted similar measures. A survey of 319 of America's largest companies found that approximately "92 percent of the firms surveyed prohibit workplace discrimination against gays and lesbians." Kirstin Downey Grimsley, *Rights Group Rates Gay-Friendly Firms*, WASH. POST, Aug. 14, 2002.

A substantial number of States and cities have prohibited discrimination based on sexual orientation. Thirteen States, eleven of them since 1990, and the District of Columbia have passed laws banning discrimination on the basis of sexual orientation.[5] National Gay & Lesbian Taskforce, GLBT Civil Rights Laws in the U.S., *available at* http://www.ngltf.org. More than 140 cities have similarly acted to prohibit discrimination based on sexual orientation. Wayne van der Meide, Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States (National Gay & Lesbian Taskforce 2000).

With the lifting of censorship and the growing interest in gay people and issues, there has been a dramatic increase in the coverage of gay issues in the media and in the number of gay characters in the movies and on television. "In Hollywood, Tom

[5] CAL. GOV'T CODE § 12920; CONN. GEN. STAT. § 46a-81c; D.C. CODE ANN.§§ 2-1401, 2-1402; HAW. REV. STAT. §§ 368-1, 368-2; MD. ANN. CODE art. 49B, § 14; MASS. GEN. LAWS ch. 151B, §§ 3, 4; MINN. STAT. § 363.12; NEV. REV. STAT. 613.330; N.H. REV. STAT. ANN. § 354-A:6; N.J. STAT. ANN. § 10:5-3; 2002 N.Y. Laws Ch. 2 (A.1971); R.I. GEN. LAWS § 28-5-2; VT. STAT. ANN. tit. 21, § 495; WIS. STAT. §§ 11.322, 11.325, 11.36.

Hanks received an Oscar for portraying a gay man with AIDS and then thanked his gay high school drama teacher before a worldwide viewing audience." D'EMILIO & FREEDMAN, INTIMATE MATTERS 368. One of the most popular television series of the last several years, *Will & Grace* (NBC), features two gay characters in leading roles, and 28 other series in the 2001-2002 season featured major gay or lesbian characters. See Gay & Lesbian Alliance Against Defamation, Where We Are on TV, *available at* http://www.glaad.org/eye/ontv/index.php. This has dramatically changed the dominant representation of homosexuals. Gay people usually appeared in the media in the 1950s only as shadowy and dangerous figures, as discussed in Part II above, but they now appear as a diverse and familiar group whose all-too-human struggles and pleasures draw the interest of large viewing audiences.

It is not only in the media that heterosexuals see homosexuals. The growing openness of lesbians and gay men about their sexual orientation since the 1970s has had a tremendous impact on their relatives, friends, neighbors, and co-workers. Growing numbers of heterosexuals realize that some of the people they most love and respect are gay. "Anywhere from half to three quarters of Americans know someone who is homosexual * * *." Frank Newport, Gallup Poll News Service, Homosexuality, Sept. 2002, *available at* http://www.gallup.com/poll. As a result, acceptance of gays has increased. See Joan Biskupic, *For Gays, Tolerance Translates To Rights*, WASH. POST, Nov. 5, 1999 ("The prevailing national sentiment * * * is one of tolerance toward sexual variation.").

Even those who are hostile to or made uneasy by homosexuality are against discrimination and intolerance. A 2002 Gallup Poll found that, while 44 percent of the people said homosexuality was unacceptable, 86 percent of those surveyed said homosexuals should have equal rights in terms of job opportunities. Newport, Gallup Poll, *supra*. Only 56 percent of

Americans supported gay rights legislation in 1977. The figure jumped to 83 percent in 1989, and increased to 86 percent in 2002. *Ibid.*

A growing number of businesses, universities, and state and municipal governments have recognized that many gay people are members of families and share the same family responsibilities other Americans do. More than 5,389 companies now offer health insurance and other benefits to the same-sex domestic partners of their employees, as do 151 state or local governments. Only four companies and three governmental units did so in 1986. Human Rights Campaign, WorkNet Database, *available at* http://www.hrc.org/worknet/dp/index.asp. More than two-thirds of the Nation's largest companies offer health benefits to same-sex partners, *What's News*, WALL ST. J., Aug. 14, 2002, including Coca-Cola and the big three automakers, *Business Brief*, WALL ST. J., June 23, 2000. President Bush recently signed legislation – named after one of the gay heroes of September 11, 2001 – allowing death benefits to be paid to the domestic partners of firefighters and police officers who die in the line of duty. Mychal Judge Police & Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (June 24, 2002).

Gay men and lesbians who parent together or as individuals have also become more numerous and visible. This has led to greater familiarity with and acceptance of gay parents. The experience of family courts that consider the best interests of individual children is revealing. Over the several decades in which courts have considered the rights of gay, lesbian, and bisexual parents, experience has led the vast majority of States to adopt custody standards that are neutral as to sexual orientation. Stephanie R. Reiss, Meghan Wharton & Joanne Romero, *Child Custody and Visitation*, 1 GEO. J. GENDER & LAW 383, 392-397 (2000); see, *e.g.*, *Jacoby* v. *Jacoby*, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000). Acceptance has increased in part because re-

search studies have led numerous influential medical and mental health groups, including the American Academy of Pediatrics, to endorse nondiscriminatory standards. American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002). Florida's ban on adoption by gay individuals, FLA. STAT. ANN. § 63.042 (West 2001), is the only one of its kind. Courts in almost half the States have allowed second-parent adoptions by gay and lesbian partners, and this mechanism is also part of the Uniform Adoption Act. Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 934 (2000); see, *e.g.*, *In re Adoption of R.B.F.*, 569 Pa. 269, 803 A.2d 1195 (2002). In gay families in which there was no second-parent adoption but there was a clear agreement jointly to parent that the parties fulfilled, many courts have allowed the second parent to secure custody or visitation rights, see, *e.g.*, *Gestl* v. *Frederick*, 133 Md. App. 216, 754 A.2d 1087 (2000), and held them to corresponding child support obligations. *L.S.K.* v. *H.A.N.*, 2002 WL 31819231 (Pa. Super. Dec. 17, 2002).

In short, there are many indications that in the last generation, and especially in the last decade, the acceptance of lesbians and gay men as full and equal members of our society has become commonplace. The growing openness of gay people and the lessening of discrimination against them have not gone unchallenged, however. Their growing visibility and acceptance have prompted a sharp reaction by some groups, just as the gains of the black civil rights movement did in the 1950s and 1960s.

The defenders of the popular prejudice of any particular age, lacking any recognizably rational basis for the distinctions they draw, often resort to claiming they are endorsed by millen-

nia of moral teaching.[6] They also distort the meaning of equal protection of the laws. When the opponents of a proposed open housing law in Detroit organized a successful voter initiative against it in 1964, for instance, they argued that such anti-discrimination measures conferred "special privileges" on African-Americans. THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 227 (1997). Opponents of laws prohibiting discrimination on the basis of sexual orientation have advanced a similar claim. JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT 111-114 (1996).

Since the 1970s, national organizations advocating "traditional family values" have paid increasing attention to the issue of gay rights and many local groups have organized to fight gay rights ordinances. In 1977, singer Anita Bryant declared that her Baptist faith moved her to lead a successful campaign to rescind a gay rights ordinance that had been passed in Dade County,

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[6] "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge's justification for banishing interracial married couple from Virginia for 25 years as a condition of suspending their criminal sentence under antimiscegenation law, which this Court held unconstitutional). But see Oral Arg. Tr. of *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), *quoted in* DAVID C. FREDERICK, SUPREME COURT AND APPELLATE ADVOCACY 45-46 (2003) (Solicitor General Cox: "We shall solve the problems as one people, and thus escape the consequences of the sins of the past, only if we act in the spirit of Lincoln's Second Inaugural: without malice, with charity, and perhaps above all, without that spirit of false self-righteousness that enables men who are not themselves without fault to point the finger at their fellows.").

Florida. See, *e.g.*, DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 292 (1999). In the next twenty years, scores of referenda were initiated to overturn such laws, almost four-fifths of them successful. GALLAGHER & BULL, PERFECT ENEMIES 16-20, 39-62, 97-124, 173-187; WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 131-132 (1999). One well-known example is Colorado's Amendment 2. In response to local ordinances banning discrimination on the basis of sexual orientation, the voters of Colorado adopted a referendum amending the state constitution to prohibit legislative, executive, or judicial action protecting gay men and lesbians. *Romer* v. *Evans*, 517 U.S. 620, 623-624 (1996). This Court determined that the Colorado amendment violated the Equal Protection Clause.

Additionally, laws permitting overt intolerance and discrimination against homosexuals, including same-sex sodomy laws in a handful of States, remain in force, with severe consequences for people's lives and livelihoods. For example, a review of twenty surveys conducted across America between 1980 and 1991 showed that between 16 and 44 percent of gay men and lesbians had experienced discrimination in employment. *Employment Discrimination on the Basis of Sexual Orientation: Hearings on S. 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. 70 (1994) (statement of Anthony P. Carnevale, Chair, National Commission for Employment Policy). Cheryl Summerville's separation notice from Cracker Barrel read: "This employee is being terminated due to violation of company policy. This employee is gay." *Id.* at 6. Labeling gay people criminals – as same-sex sodomy laws do – also leads to the imposition of many legal disabilities "because the law permits differential treatment of criminals." Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 115 (2000). Some – but by no means all

– of the most important disabilities arise in parents' efforts to maintain relationships with their children. See, *e.g.*, *Bottoms* v. *Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (although "a lesbian mother is not *per se* an unfit parent[,] * * * [c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth * * *; thus, that conduct is another important consideration in determining custody").

We ask the Court to consider the findings of recent historical scholarship on the history of sexual regulation, sodomy prohibitions, and anti-gay discrimination as it considers this case. In our judgment as historians, the lessons of this history are clear. The history of antigay discrimination is short, not millennial. In early American history, "sodomy" was indeed condemned, but the concept of "the homosexual" and the notion of singling out "homosexual sodomy" for condemnation were foreign. Through most of our Nation's history, sodomy laws prohibited some forms of same-sex conduct only as one aspect of a more general (and historically variable) prohibition.

It was only in the twentieth century that the government began to classify and discriminate against certain of its citizens on the basis of their homosexual status. An array of discriminatory laws and regulations targeting lesbians and gay men were put in place in a relatively short period of time. In recent years, a decisive majority of Americans have recognized such measures for what they are – discrimination that offends the principles of our Nation – yet a number of them remain in place. The 1973 Texas Homosexual Conduct Law at issue is an example of such discriminatory laws. They hold no legitimate place in our Nation's traditions.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

BRIEF FOR AMICI CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND TEXAS CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Texas' "homosexual conduct" law, Texas Penal Code § 21.06, which prohibits certain forms of private, consensual sexual activity only between persons of the same sex, violates the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE

The American Psychological Association is a nonprofit scientific and professional organization with more than 155,000 members and affiliates, including the majority of psychologists holding doctoral degrees from accredited universities in this country. The American Psychiatric Association, founded in 1844, is the Nation's leading organization of physicians specializing in psychiatry, with approximately 42,000 members. The National Association of Social Workers (NASW) is a nonprofit professional association of social workers, with more than 150,000 members in every state and internationally. The Texas Chapter of NASW represents 5,625 professional social workers in the State of Texas.[1]

Human sexuality and relationships, and the effects of prejudice, are the concern of a substantial number of *amici*'s members, as researchers or clinicians. *Amici* submit this brief to describe empirical research from the social and behavioral sciences pertaining to sexuality, sexual orientation, and the social psychology of prejudice. This research demonstrates the harms from, and the groundless assumptions behind, the law at issue here.[2]

SUMMARY OF ARGUMENT

I. Decades of research and clinical experience have led all mainstream mental health organizations in this country to the conclusion that homosexuality is a normal form of human sexuality. Homosexuality—defined as a pattern of erotic, affectional, and romantic attraction principally to

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[1] No counsel for a party authored any part of this brief. No person or entity other than *amici* and their counsel made any monetary contribution towards the preparation or submission of this brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

[2] *Amici* acknowledge the assistance of Gregory M. Herek, Ph.D., Susan D. Cochran, Ph.D., Douglas C. Haldeman, Ph.D., Charlotte J. Patterson, Ph.D., and Judith M. Glassgold, Psy.D., in the preparation of this brief.

members of one's own sex—has consistently been found in a substantial portion of the American adult population. Typically, an individual's sexual orientation appears to emerge between middle childhood and early adolescence. Most or many gay men and lesbians (men and women who identify themselves as homosexual) consistently report that they experience either no or little choice in their sexual attraction to persons of their own sex. Research has also found no inherent association between homosexuality and psychopathology. All of this evidence has led mental health professional organizations to conclude that homosexuality is simply one normal variant of sexual identity. These organizations long ago abandoned classifications of homosexuality as a disorder and do not support therapies designed to change sexual orientation. Moreover, there is no reliable scientific evidence of the effectiveness of such therapies.

II. Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being, and social adjustment. There is no sound basis in social science for Texas' attempt to deny gay men and lesbians the opportunity to participate in this basic constituent of human happiness. Like heterosexuals, many gay men and lesbians desire to form long-lasting and committed relationships and succeed in doing so. These relationships manifest the same kinds of psychological dynamics as do heterosexual relationships, and sexual intimacy plays an important role in both kinds of partnerships. These committed relationships, in turn, form the core of healthy family units. Many gay men and lesbians are raising children. No evidence suggests that these children will suffer any pathology as a result.

As the Texas law recognizes, the forms of sexual contact that it targets as "deviate sexual intercourse" are in fact among the means that heterosexual couples can use to express intimacy (as many do). For gay partners, these forms of sexual activity are particularly important for expression of sexual intimacy. The mental health professions do not associate oral and anal sex with any psychopathology and do not view them as "deviate."

III. Texas Penal Code § 21.06 reinforces prejudice, discrimination, and violence against gay men and lesbians. Gay people encounter real and substantial manifestations of prejudice in our society, including harassment and violence, because of their sexual orientation. Although many gay men and lesbians learn to cope with the social stigma against homosexuality, this pattern of prejudice can cause gay people serious psychological distress, especially if they attempt to conceal or deny their sexual orientation. Section 21.06 sustains prejudice by discouraging gay men and lesbians from disclosing their true identities to their acquaintances. Studies of interpersonal prejudice, including prejudice against homosexuals, consistently show that prejudice is reduced when members of the majority group have knowing contact with minority group members. But if gay men and lesbians are compelled to conceal their sexual orientation, heterosexuals are denied the opportunity to have personal contact with openly gay people and to perceive them as individuals. The Texas law also discourages gay men and lesbians from seeking legal protection, especially in cases of anti-gay violence, because doing so would require them to disclose their sexual orientation.

ARGUMENT

I. Homosexuality Is A Normal Form Of Human Sexuality

Although Texas defines "[d]eviate sexual intercourse" in terms of certain kinds of sexual activity, regardless of the sex of the partners,[3] Texas Penal Code § 21.06 *prohibits* that conduct, when it is carried out in private and by consenting

[3] Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

adults, *only* between persons of the same sex.[4] Because Texas does not attempt to punish consensual, private sexual conduct between adults of different sexes, § 21.06 must rest on the perception that intimate sexual activity warrants suppression when, but only when, it occurs between persons of the same sex. Scientific research and the experience of the mental health professions do not support that position. To the contrary, the sexual orientation known as homosexuality—which is based on an enduring pattern of sexual or romantic attraction exclusively or primarily to others of one's own sex[5]—is a normal variant of human sexual expression; it is not a mental or psychological disorder; and it is highly resistant to change.

A. The Significance Of Sexual Orientation

At the root of this case are some basic human truths well documented in empirical research. Sexual attraction and expression are important components of romantic relationships. Sexual orientation is therefore integrally linked to the close bonds that human beings form with others to meet their personal needs for love, attachment, and intimacy.[6]

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[4] Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."

[5] *Homosexuality*, in Am. Psychol. Ass'n, 4 *Encyclopedia of Psychology* 149 (A.E. Kazdin ed. 2000); *Homosexuality*, in 2 *The Corsini Encyclopedia of Psychology and Behavioral Science* 683-688 (W.E. Craighead & C.B. Nemeroff eds., 3d ed. 2001).

[6] *Sexual orientation* refers to an enduring pattern or disposition to experience erotic, affectional, or romantic attractions primarily to men, to women, or to both sexes. It also refers to the sense of personal and social identity based on those affections and behaviors related to them. *See* J.C. Gonsiorek & J.D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *Homosexuality: Research Implications* 1; *Sexual Orientation*, in 4 *Encyclopedia of Psychology*, *supra*, at 260-263; *Homosexuality*, in 2 *Corsini Encyclopedia*, *supra*, at 683-688. Sexual orientation is usually understood in terms of three categories: *heterosexual*—having sexual and romantic attraction primarily or exclusively to members of the other sex; *homosexual*—having sexual and romantic attraction primarily or exclusively to members of one's own sex; and *bisexual*—having a significant degree of sexual and romantic attraction to both men and women. The concept of sexual orientation encompasses a variety of phenomena, including specific sexual acts; patterns of sexual attractions to men, women, or both; patterns of romantic and emotional bonding with men, women, or both; the personal sense of self as heterosexual, homosexual, or bisexual; public identities as heterosexual, homosexual or bisexual; and membership in a community defined by sexual orientation, *e.g.*, the gay and lesbian communities. *See Homosexuality*, in 4 *Encyclopedia of Psychology*, *supra*; *Homosexuality*, in 2 *Corsini Encyclopedia*, *supra*.

As used in this brief, *gay* refers to men and woman whose social identity or sexual orientation is based on their primary erotic, affectional, and romantic attraction to members of their own sex, and *lesbian* refers to women who are gay.

These bonds also encompass nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment. Because of the fundamental and identity-defining character of these bonds, sexual orientation is closely related to important personal identities, social roles, and community memberships. Just as with heterosexuals, many homosexual persons define themselves in terms of their roles as partners in committed relationships and, in fact, as parents. More broadly, being gay or lesbian is itself often an important personal identity, commonly associated with membership in a minority community, and can also be an important part of a social role. *See* G.M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in *Out in Force: Sexual Orientation and the Military*, 197, 201-202 (G.M. Herek et al. eds. 1996).

B. The Distribution Of Heterosexuality, Homosexuality, And Bisexuality In The Population

The exact proportions of heterosexuals, homosexuals, and bisexuals in the adult population of the United States are

not known.[7] Different surveys have measured different aspects of sexual orientation and, consequently, have reached different estimates. For example, the National Health and Social Life Survey ("NHSLS Survey"), the most comprehensive survey to date of American sexual practices, found that approximately 5% of men and 4% of women reported having had sex with a same-sex partner since age 18.[8] E.O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States*, 294, 303 (1994).[9] A larger proportion of respondents—approximately 8% of men and women alike—reported that they experienced attraction

[7] Because homosexuality and bisexuality are widely stigmatized in American society (*see* pp. 23-24, *infra*), many individuals are reluctant or unwilling to reveal that they are not heterosexual, even in anonymous surveys. Recognition of this problem has led researchers to investigate a variety of methods for increasing respondents' willingness to report homosexual conduct. *See* C. F. Turner, L. Ku, S. M. Rogers, L. D. Lindberg, J. H. Pleck, and F. L. Sonenstein, *Adolescent Sexual Behavior, Drug Use, And Violence: Increased Reporting With Computer Survey Technology*, 280 Science 867-873 (1998). Researchers generally assume that estimates of the distribution of sexual orientation in the population underestimate the actual proportion of non-heterosexuals. *See, e.g.*, E.O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 284 (1994) (NHSLS Survey); S.M. Rogers & C.F. Turner, *Male-Male Sexual Contact in the USA: Findings From Five Sample Surveys, 1970-1990*, 28 J. Sex Res. 491, 513-514 (1991).

[8] The NHSLS Survey, which was conducted by researchers at the University of Chicago, was based on a representative sample of American adults between ages 18 and 59. *See* Laumann et al., *Social Organization of Sexuality*, *supra*, at 294.

[9] *See also* Rogers & Turner, *supra*, at 513-14 (estimating that at least 5-7% of U.S. men experienced same-sex sexual contact during adulthood); D. Black et al., *Demographics of the Gay and Lesbian Population of the United States: Evidence from Available Systematic Data Sources*, 37 Demography 139, 141-142 (2000) (finding that approximately 5% of men and 4% of women had at least one same-sex sexual experience since age 18, and approximately 3% of men and 1% of women reported sexual experiences in the preceding year exclusively with a partner of same sex).

to persons of their own sex, considered the prospect of sex with a same-sex partner appealing, or both. *See id.* at 305.

C. The Development Of Sexual Orientation

Heterosexual and homosexual behavior are both normal aspects of human sexuality. Both have been documented in many different human cultures and historical eras, and in a wide variety of animal species.[10] There is no consensus among scientists about the exact reasons why an individual develops a heterosexual, bisexual, or homosexual orientation.[11] According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience.[12]

[10] *See generally* J. Boswell, *Christianity, Tolerance and Homosexuality* (1980); D.F. Greenberg, *The Construction Of Homosexuality* (1988); S.O. Murray, *Homosexualities* (2000); E. Blackwood & S.E. Wieringa eds., *Female Desires: Same-Sex Relations And Transgender Practices Across Cultures* (1999); B. Bagemihl, *Biological Exuberance: Animal Homosexuality And Natural Diversity* (1999); C.S. Ford & F.A. Beach, *Patterns Of Sexual Behavior* (1951).

[11] Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. The evaluation of *amici* is that, although some of this research may be promising in facilitating greater understanding of the development of sexual orientation, it does not permit a conclusion based in sound science at the present time as to the cause or causes of sexual orientation, whether homosexual, bisexual, or heterosexual. *See generally Sexual Orientation*, in 7 *Encyclopedia of Psychology*, *supra*, at 260-263; *Homosexuality*, in 2 *Corsini Encyclopedia*, *supra*, at 683-688.

[12] *See* R.C. Savin-Williams, *. . . And Then I Became Gay: Young Men's Stories* 1-19 (1998) (reviewing research); G. Remafedi, *Demography of Sexual Orientation in Adolescents*, 89 Pediatrics 714 (1992); A. Bell et al., *Sexual Preference: Its Development in Men and Women* 186-187 (1981); R.C. Savin-Williams & L.M. Diamond, *Sexual Identity Tra-*

Most or many gay men and lesbians experience little or no choice about their sexual orientation. In the Kinsey studies of the 1940s and 1950s, for example, substantial numbers of respondents reported never experiencing sexual attraction to members of the other sex, and many others reported experiencing only incidental attractions to or behaviors with the other sex.[13] More recent studies have reported that most gay men and most or many lesbians experience either no choice or very little choice in their sexual attraction to members of their own sex. In a study that included a community-based sample of 125 gay men and lesbians, 80% of the gay men and 62% of the lesbians said they had "no choice at all" about being gay, lesbian, or bisexual. *See* G.M. Herek et al.,

jectories Among Sexual-Minority Youths: Gender Comparisons, 29 Archives of Sexual Behavior 419 (2000) (reporting data from a sample of 164 sexual-minority young adults, aged 17-25 years, and finding that first recognizing same-sex attractions preceded first same-sex sexual experience by, on average, approximately 6 years for males, and 7 years for females).

[13] In interviews with more than 10,000 adults, Alfred Kinsey and his colleagues categorized respondents according to the extent to which their sexual behaviors and emotional attractions and fantasies were heterosexual or homosexual after the onset of adolescence. Kinsey et al. reported that 4% of the white males in their sample were exclusively homosexual. *See* A. Kinsey et al., *Sexual Behavior in the Human Male* 651 (1948). In their study of female sexuality, they reported that 1-3% (depending on current age) of unmarried and previously married respondents were exclusively homosexual between the ages of 20 and 35. *See* A. Kinsey et al., *Sexual Behavior in the Human Female* 474, 488 (1953). The extent to which the percentages reported by Kinsey and his colleagues can be generalized to the current U.S. population has been a topic of controversy. *See generally* S. Michaels, *The Prevalence of Homosexuality in the United States*, in *Textbook of Homosexuality and Mental Health* 43 (R.P. Cabaj & T.S. Stein eds., 1996). Whether or not Kinsey's findings accurately describe the current distribution of heterosexuals, homosexuals, and bisexuals in the general population, however, they document the existence of a sizable number of individuals whose history of sexual attractions and behaviors is exclusively or almost entirely homosexual.

Correlates of Internalized Homophobia In a Community Sample of Lesbians and Gay Men, 2 J. Gay & Lesbian Med. Ass'n 23 (1998). The same researchers subsequently conducted a larger study that included 898 gay men and 980 lesbians. In that larger study, 85% of the gay men and 68% of the lesbians reported having either "no choice" or "very little choice" about their sexual orientation.[14] Other studies have reached similar conclusions.[15]

D. The Recognition That Homosexuality Is Not A "Mental Disorder"

The American mental health professions concluded more than a quarter-century ago that homosexuality is not a mental disorder.[16] That conclusion was reached after decades of study of homosexuality by independent researchers, as well as numerous attempts by practitioners in the mental-health professions to effectuate a change in individuals' sexual orientation. During the first half of the 20th century, many mental health professionals regarded homosexuality as a pathological condition, but that perspective reflected untested

[14] *See* G.M. Herek, et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. Consulting & Clinical Psychol. 945 (1999) (describing study). In the larger study, responses to the question about the degree of choice that respondents experienced surrounding their sexual orientation were not included in the published report but are on file with *amicus* American Psychological Association, and will be provided to the Court upon request.

[15] *See* R.C. Savin-Williams, *Gay and Lesbian Youth: Expressions of Identity* 77, 79 (1990); S. Rosenbluth, *Is Sexual Orientation A Matter of Choice?*, 21 Psychol. Women Q. 595, 603 (1997).

[16] A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (*e.g.*, a painful symptom) or disability (*i.e.*, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* xxxi (4th ed. text rev. 2001) ("DSM-IV-TR").

assumptions supported largely by clinical impressions of patients seeking therapy and individuals whose conduct brought them into the criminal justice system. *See* J.C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality: Research Implications for Public Policy* 115 (J.C. Gonsiorek & J.D. Weinrich eds., 1991). Those assumptions were not subjected to rigorous scientific scrutiny with nonclinical, non-incarcerated samples until the latter half of the century. Once the notion that homosexuality is linked to mental illness was empirically tested, it proved to be based on untenable assumptions and value judgments.

In one of the first rigorous examinations of the mental health status of homosexuality, Dr. Evelyn Hooker administered a battery of standard psychological tests to homosexual and heterosexual men who were matched for age, IQ, and education. *See* Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techniques 17-31 (1957). None of the men was in therapy at the time of the study. Based on the ratings of expert judges who were kept unaware of the men's sexual orientation, Hooker determined that homosexual and heterosexual men could not be distinguished from one another on the basis of the psychological testing, and that a similar majority of the two groups appeared to be free of psychopathology. She concluded from her data that homosexuality is not inherently associated with psychopathology and that "homosexuality as a clinical entity does not exist." *Id.* at 18-19. Hooker's findings were followed over the next two decades by numerous studies, using a variety of research techniques, which similarly concluded that homosexuality is not related to psychopathology or social maladjustment.[17]

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[17] For reviews, *see* Gonsiorek, *Empirical Basis*; *supra*, at 115; J.C. Gonsiorek, *Results of Psychological Testing On Homosexual Populations*, 25 Am. Behavioral Sci. 385, 394 (1982); Bernard F. Reiss, *Psychological Tests in Homosexuality*, in *Homosexual Behavior: A Modern Reappraisal* 296 (J. Marmor ed. 1980); Hart et al., *Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature*, 39 J. Clinical Psychiatry 604 (1978).

In 1973, in recognition that scientific data do not indicate that a homosexual orientation is inherently associated with psychopathology, *amicus* American Psychiatric Association's Board of Trustees voted to remove homosexuality from the Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders.* That resolution stated that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights* (Dec. 15, 1973), *printed in* 131 Am. J. Psychiatry 497 (1974). That decision was upheld by a vote of the Psychiatric Association's membership the following year. After a thorough review of the scientific evidence, *amicus* American Psychological Association adopted the same position in 1975, and urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation. *See* Am. Psychol. Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975). *Amicus* National Association of Social Workers (NASW) has adopted a similar policy. *See* NASW, *Policy Statement on Lesbian and Gay Issues* (Aug. 1993) (approved by NASW Delegate Assembly), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 162 (3d ed. 1994).

Of course, as is the case for heterosexuals, some homosexuals have mental illnesses, psychological disturbances, or poor social adjustment. Gay men, lesbians, and bisexuals also may be at somewhat greater risk for some kinds of psychological problems because of stresses associated with the experiences of social stigma and prejudice (*see* pp. 23-27, *infra*).[18] But research conducted over four decades has estab-

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[18] *See* V.M. Mays & S.D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in*

lished that "homosexuality in and of itself bears no necessary relationship to psychological adjustment."[19] The efforts to "cure" homosexuality that were prevalent in earlier generations—which included hypnosis, administration of hormones, aversive conditioning with electric shock or nausea-inducing drugs, lobotomy, electroshock, and castration[20]—are now regarded by the mental-health professions as regrettable.

E. Efforts To Change Sexual Orientation

Section 21.06 prohibits only same-sex intimate behavior, and does not prohibit the same kinds of intimate sexual contacts when carried out in private between adults of different sexes. The law is therefore presumably based on the assumption that persons who engage in homosexual activity (or who desire to do so) either should live without the (for them) primary forms of sexual expression (with the obvious personal harm caused thereby) or should attempt to reorient their sexual interest towards members of the other sex. But scientific research does not support this assumption, and the clinical experience of *amici* contradicts it; indeed, all major national mental health organizations have officially expressed concerns about therapies promoted to change sexual orientation (*see* pp. 14-15, *infra*). Given the strong stigma against ho-

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the United States, 91 Am. J. Pub. Health 1869 (2001); S.E. Gilman et al., *Risk Of Psychiatric Disorders Among Individuals Reporting Same-Sex Sexual Partners in the National Comorbidity Survey*, 91 Am. J. Pub. Health 933 (2001); S.D. Cochran & V.M. Mays, *Relation Between Psychiatric Syndromes and Behaviorally Defined Sexual Orientation in a Sample of the US Population*, 151 Am. J. Epidemiology 516 (2000).

[19] Gonsiorek, *Empirical Basis*, *supra*, at 135; *see also* Gonsiorek, *Results of Psychological Testing*, *supra*, at 385, 394; *see also* Reiss, *supra*, at 296-311; Hart et al., *supra*, at 604.

[20] *See* D.C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in *Homosexuality: Research Implications*, *supra*; C. Silverstein, *Psychological and Medical Treatments of Homosexuality*, in *Homosexuality: Research Implications*, *supra*, at 101, 106-111; J.N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 129 (1976).

mosexuality that remains in place in our society, however (*see* pp. 23-24, *infra*), it is perhaps not surprising that some persons who experience sexual attractions towards members of their own sex nonetheless feel that they should attempt to change their sexual orientation and seek treatment to that end.

Some groups and individuals continue to offer interventions—sometimes called "conversion" or "reparative" therapies—that purport to change sexual orientation from homosexual to heterosexual. To date, however, there has been no scientifically adequate research to show that interventions aimed at changing sexual orientation are effective or safe. Moreover, critical examinations of reports of the effectiveness of these therapies have highlighted numerous problems with such claims.[21] One scholar has thus concluded upon

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[21] First, in many behavior-change techniques, "success" has been defined as suppression of homoerotic response or mere display of physiological ability to engage in heterosexual intercourse. Neither outcome, however, is the same as adopting the complex set of attractions and feelings that constitute sexual orientation. Second, in some of the treatments, the persons in therapy have reduced their same-sex conduct, but have not necessarily developed or increased their heterosexual attractions. Third, in many published reports of conversion therapies, the participants' initial sexual orientation was never adequately assessed, and many bisexuals may have been mislabeled as homosexuals, with the consequence that the "successes" actually occurred among bisexuals who were highly motivated to adopt a heterosexual behavior pattern. The extent to which people have actually changed their behavior—even within the confines of these inadequate operational definitions—often has not been systematically assessed. Instead, only patients' self-reports and therapists' subjective impressions have been available, without the use of control groups or any methodological safeguards against bias. More rigorous objective assessments (*e.g.*, behavioral indicators over an extended period of time, evaluation by an independent third party who is unaware of which patients received the intervention) have been lacking. *See* D.C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221 (1994); Haldeman, *Sexual Orientation Conversion Therapy*, *supra*, at 149-160. Although some highly motivated individuals have reported that they changed their sexual orienta-

review of reports on "conversion therapy" that there is no reliable scientific evidence that "sexual orientation is amenable to redirection or significant influence from psychological intervention."[22]

In addition to the lack of scientific evidence for the effectiveness of efforts to change sexual orientation, there is reason to believe such efforts can be harmful to the psychological well-being of those who attempt them. Clinical observations and self-reports indicate that many individuals who unsuccessfully attempt to change their sexual orientation undergo considerable psychological distress. In fact, the potential psychological risks to some patients undergoing conversion therapies are sufficiently significant that treatment protocols have been developed to assist them in overcoming a wide range of psychological and relational problems.[23]

Accordingly, the mainstream view in the mental health professions is that the most appropriate response of a therapist treating an individual who is troubled about his or her homosexual feelings is to help that person cope with social prejudices against homosexuality and lead a happy and satisfying life as a lesbian or gay man.[24] Reflecting that view, all major national mental health organizations—including *amici* American Psychological Association, American Psychiatric

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tion to heterosexual subsequent to such interventions, their self-reports of change cannot be used to validate the efficacy or assess the safety of an intervention. Lacking controlled studies, it cannot be known to what extent these individuals would have changed regardless of the intervention that they underwent.

[22] Haldeman, *Practice and Ethics*, *supra*, at 224.

[23] *See* A. Shidlo & M. Schroeder, *Changing Sexual Orientation: A Consumers' Report*, 33 Prof. Psychol. Res. and Prac. 249 (2002); D.C. Haldeman, *Therapeutic Antidotes: Helping Gay and Bisexual Men Recover from Conversion Therapies*, 5 J. Gay & Lesbian Psychotherapy 117 (2001).

[24] *See, e.g., Guidelines for Psychotherapy with Lesbian, Gay, and Bisexual Clients*, 55 Am. Psychologist 1440, 1443 (2000); *see also* p. 15 n. 25, *infra* .

Association, and NASW, as well as the American Academy of Pediatrics and the American Counseling Association—have adopted policy statements cautioning the profession and the public about treatments that purport to change sexual orientation.[25]

II. Suppressing Sexual Intimacy Among Same-Sex Partners Would Deprive Gay Men And Lesbians Of The Opportunity To Participate In Fundamental Aspects Of Human Experience

A. The Importance Of Sexual Intimacy

As this Court has recognized, sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality."[26] The human impulse for sexual intimacy, as well as the importance of this impulse to the self and to the development of close relationships with others, have been observed and chronicled for centuries. The mental health professions have also long recognized the importance of the desire for sexual intimacy in the development of the self, in the

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[25] *See* Am. Psychol. Ass'n, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation* (1998); Am. Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998); Nat'l Ass'n of Social Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues* (1996); Am. Acad. Pediatrics, *Homosexuality and Adolescence* (1993); *Action by American Counseling Association Governing Council* (1999). These policy statements are available on the internet at http://www.apa.org/pi/lgbc/publications/justthefacts.html. The statement of *amicus* American Psychiatric Association cautions that "[t]he potential risks of 'reparative therapy' are great, including depression, anxiety and self-destructive behavior." The Psychiatric Association also observes that "[m]any patients who have undergone 'reparative therapy' relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction." The policy statement of the American Academy of Pediatrics advises that "[t]herapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation."

[26] *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 63 (1973).

establishment of close relationships, and in the maintenance of family units. And the most recent study of the sexual behavior of the American population has found that sexual satisfaction in intimate relationships is linked to satisfaction with those relationships and with general satisfaction with life.[27]

Of course, many individuals lead productive and psychologically healthy lives in which sex or an intimate partner does not play an important role. The importance of sexuality in relationships also varies considerably across individuals and throughout the life span. Texas, however, seeks to deny even the *opportunity* to participate in these profound aspects of human experience to a particular class of persons: gay men and lesbians. For those persons who predominantly experience erotic, affectional, and romantic attraction towards persons of the same sex, Texas Penal Code § 21.06 makes criminal the primary means by which they express the normal human impulse for sexual intimacy. Section 21.06 thus does not merely prohibit sexual conduct of a certain kind; it impinges on the ability of gay men and lesbians to participate in activities that have long been recognized as important aspects of humanity: to develop the emotional self, to build a supportive relationship with a partner, and to create a family unit.

B. The Importance Of Committed Relationships To Gay Men And Lesbians

Like their heterosexual counterparts, many gay men and lesbians desire to form long-lasting, committed relationships in which sexual intimacy plays an important part, and also succeed in doing so. Empirical studies using non-representative samples of gay men and lesbians typically report that large proportions are currently involved in a com-

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[27] E.O. Laumann et al., *Sexual Dysfunction in the United States: Prevalence and Predictors*, 281 JAMA 537 (1999) (reporting findings from NHSLS Survey).

mitted relationship (40-70% of gay men and 45-80% of lesbians), and that the vast majority have been involved in such a relationship at some time in their lives.[28] Recent surveys based on representative samples of gay men, lesbians, and bisexuals indicate that many of those couples are cohabiting.[29]

Additional information about lesbian and gay couples has become available from the 2000 census, which allowed individuals to indicate that they were a member of a same-sex couple living together in the same household. A preliminary analysis of the census data reported that same-sex couples head more than 594,000 households in the United States, with at least one same-sex couple in 99% of the nation's counties.[30] These findings from the census data represent a low estimate of the number of same-sex couples in the United States. Because of concerns about stigma—as well as lack of widespread information about this portion of the census form—it is likely that many same-sex couples did not identify themselves as such on the census form. In addition,

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[28] *See* L.A. Peplau & L.R. Spalding, *The Close Relationships of Lesbians, Gay Men and Bisexuals*, in *Close Relationships: A Sourcebook* 114 (Hendrick & Hendrick eds. 2000); L.A. Kurdek, *Lesbian and Gay Couples*, in *Lesbian, Gay, and Bisexual Identities Over the Lifespan* 243-261 (A.R. D'Augelli & C.J. Patterson eds. 1995) (reviewing literature).

[29] *See* Henry J. Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in Americu and the Public's Views on Issues and Policies Related to Sexual Orientation* 4 (2001) (28% of 405 lesbians, gay men, and bisexuals surveyed reported cohabiting with a partner) ("Kaiser Family Foundation Report"); T.C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in "Gay Ghettos" with Those Living Elsewhere*, 91 Am. J. Pub. Health, 980, 982 tbl. 1 (2001) (39% of men living in identifiably gay neighborhoods and 33% of men living outside such neighborhoods reported currently having a committed relationship).

[30] U.S. Census Bureau, United States Census 2000, *Unmarried-Partner Households By Sex of Partners*, Table PCT 14, *available at* http://factfinder.census.gov; *see also Households Headed By Gays Rose in the 90's*, Data Shows, N.Y. Times, Aug. 22, 2001, at A17.

the census form permitted reporting only of cohabiting couples, thereby excluding non-cohabiting couples.

Research demonstrates that these committed relationships between gay partners strongly resemble heterosexual partnerships in many respects. Like heterosexual couples, gay couples form deep emotional attachments and commitments. Heterosexual couples, gay male couples, and lesbian couples all face similar issues—such as intimacy, love, equity, loyalty, and stability—and go through similar processes to address those issues.[31] Research examining the quality of intimate relationships also shows that gay and lesbian couples do not differ from heterosexual couples in their satisfaction with the relationship.[32] Thus, a 1991 review of the literature on gay and lesbian couples concluded that "most lesbians and gay men want intimate relationships and are successful in creating them. Homosexual partnerships appear no more vulnerable to problems and dissatisfactions than their heterosexual counterparts."[33]

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[31] *See generally* Peplau & Spalding, *Close Relationships*, *supra*, at 111, 114; *see also* R.A. Mackey et al., *Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples*, 43 Sex Roles 201 (2000); L.A. Kurdek, *Differences Between Heterosexual-Nonparent Couples and Gay, Lesbian and Heterosexual-Parent Couples*, 22 J. Fam. Issues 727 (2001).

[32] "Empirical research has found striking similarities in the reports of love and satisfaction among contemporary lesbian, gay and heterosexual couples." Peplau & Spaulding, *Close Relationships*, *supra*, at 114. *See also* Mackey et al., *Psychological Intimacy*, *supra*; Kurdek, *Differences Between*, *supra*.

[33] L.A. Peplau, *Lesbian and Gay Relationships*, in *Homosexuality: Research Implications*, *supra*, at 195; *see also* Kurdek, *Differences Between*, *supra* (finding no differences between gay and lesbian couples and heterosexual couples without children on individual personality differences, views on relationships, conflict resolution, and satisfaction). A major study of heterosexual and gay couples in the United States undertaken in the early 1980s similarly concluded that "[c]ouplehood, either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals." P. Blumstein and P. Schwartz, *American Couples: Money, Work, Sex* 45 (1983).

As with heterosexual relationships, sexuality is an important aspect of most enduring gay and lesbian relationships. For same-sex couples, as for heterosexuals, sex serves to create a bond between the partners. "Having sex is an act that is rarely devoid of larger meaning for a couple. It always says something about partners' feelings for each other, what kind of values they share, and the purpose of their relationship." P. Blumstein & P. Schwartz, *American Couples: Money, Work, Sex* 193 (1983). Thus, for both gay and heterosexual couples, "a good sex life is central to a good overall relationship." *Id.* at 201, 205-206.[34] Gay and heterosexual relationships are thus similar in such basic respects as their emotional content, the importance of the relationship to the individual, and the role of sexuality in strengthening the relationship.

C. Gay Men And Lesbians As Parents

Not only do gay men and lesbians successfully form long-term intimate relationships that resemble heterosexual families; they also raise children together in these families. Although there are no data to indicate the exact number of lesbians and gay men in the United States who are parents, psychologists who study this topic suggest that hundreds of thousands, perhaps millions, of American parents today identify themselves as gay or lesbian, and that the children of lesbian and gay parents in the United States today almost cer-

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[34] *See also* L. Kurdek, *Sexuality in Homosexual and Heterosexual Couples*, in *Sexuality in Close Relationships* 177 (K. McKinney & S. Sprecher eds. 1991); L.A. Peplau, et al., *A National Survey of the Intimate Relationships of African-American Lesbians and Gay Men: A Look at Commitment, Satisfaction, Sexual Behavior, and HIV Disease*, in *Ethnic And Cultural Diversity Among Lesbians And Gay Men* 11 (B. Greene ed. 1997) (finding that greater sexual frequency and higher sexual satisfaction were correlated with relationship satisfaction among African-American lesbians and gay men).

tainly number in the millions. *See* C.J. Patterson & L.V. Friel, *Sexual Orientation and Fertility*, in *Infertility in the Modern World: Biosocial Perspectives* 238 (G. Bentley & N. Mascie-Taylor eds. 2000).

Over the past two decades, research about children of gay parents has yielded the consistent conclusion that these children demonstrate no deficits in intellectual development, social adjustment, or psychological well-being as compared to children of heterosexual parents.[35] A recent article surveying the scientific studies on this issue reported no differences between children raised by lesbians and those raised by heterosexuals with respect to self-esteem, anxiety, depression, behavioral problems, performance in social arenas (sports, school and friendships), use of psychological counseling, mothers' and teachers' reports of children's hyperactivity, unsociability, emotional difficulty, or conduct difficulty.[36] Thus, the evidence demonstrates that lesbians and gay men form family units that are similar in many respects to those of heterosexuals.

Of course, families headed by gay couples may encounter particular issues and challenges, much as families of racial and ethnic minority group members, low-income families, and single-parent families do. No evidence suggests, however, that families headed by gay couples are as a group unable to meet these challenges. Rather, the evidence demonstrates that lesbians and gay men frequently establish long-

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[35] *See* J. Stacey & T. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159-183 (2001); E.C. Perrin et al., *Technical Report: Coparent or Second-parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 342 (2002) (report of American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health); G.D. Green & F.W. Bozett, *Lesbian Mothers and Gay Fathers*, in *Homosexuality: Research Implications*, *supra*, at 197, 213; *see also* C.J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025 (1992).

[36] Stacey & Biblarz, *supra*, at 169, 171.

term, committed relationships strengthened by the bond of sexual intimacy between the partners, and with increasing incidence successfully raise children in those family settings.

D. The Role Of The Conduct Proscribed By Texas In Sexual Intimacy

Although Texas places the label "deviate sexual intercourse" on certain kinds of sexual contacts (*see* Texas Penal Code § 21.01(1); pp. 3-4, *supra*), it allows the choice of such acts by heterosexual couples, and social science research shows that those forms of contact are important aspects of sexual intimacy for many American heterosexual couples.[37] Oral sex, for example, is plainly common among many opposite-sex couples as well as same-sex couples. In 1994, the National Health and Social Life Survey (NHSLS Survey) found that at least 77% of adult males had engaged in oral sex with a partner, and that at least 68% of women had engaged in oral sex. *See* Laumann et al., *Social Organization of Sexuality*, *supra*, at 98. In the same study, at least 27% of men and 19% of women reported that they had engaged in oral sex in their most recent sexual experience. *See id.* These findings are consistent with results obtained in other studies.[38]

Research also indicates that significant numbers of heterosexuals engage in anal sex. The NHSLS Survey found that 26% of men and 20% of women had engaged in anal in-

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[37] This observation is not new in the field of sex research. In 1948, Kinsey estimated that, if the existing criminal laws forbidding various sex acts were enforced, 95% of all white American males would have been subject to prosecution. Kinsey et al., *Sexual Behavior in the Human Male*, *supra*, at 390-393.

[38] For example, a 1991 survey of U.S. males aged 20-39 years reported that 75% had performed oral sex on a partner, and 79% had received oral sex from a partner. J.O.G. Billy et al., *The Sexual Behavior of Men in the United States*, 25 Fam. Plan. Persps. 52, 57 (1993). Another study of 300 couples found that 93% of heterosexual couples had engaged in oral sex. *See* Blumstein & Schwartz, *supra*, at 236.

tercourse. *See* Laumann et al., *Social Organizion of Sexuality*, *supra*, at 99. Based on a review of the published literature and analysis of survey data, one study concluded that approximately 25% of U.S. adults have engaged in heterosexual anal intercourse. S.N. Seidman & R.O. Reider, *A Review of Sexual Behavior in the United States*, 151 Am. J. Psychiatry 330 (1994).[39]

For gay people, oral and anal sex are primary means of expressing sexual intimacy. Although gay men and lesbians engage in forms of sexual activity other than oral and anal sex, surveys have shown that oral sex is a primary means for expression of sexual intimacy for both gay men and lesbians, and that anal sex is a primary means of expressing sexual intimacy for gay men.[40] Research also reveals that these intimate forms of sexual contact can enhance both heterosexual and gay relationships, and that for gay people in particular, they provide emotional satisfaction and promote the formation of long-term bonds.[41]

None of the leading national associations of mental health professionals considers oral or anal sex to be pathological (*i.e.*, detrimental to mental health, psychological well being, or social adjustment). None of the diagnostic descriptions of mental disorders used by health-care practitioners, including the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2001), includes oral or anal sex as pathological sexual syndromes, whether undertaken between

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[39] In another study, 20% of males aged 20-39 reported that they had had anal sex. Billy et al., *supra*, at 56. *See also* B. Powis et al., *Heterosexual Anal Intercourse, Health Risks and Drug Use*, 14 Drug and Alcohol Rev. 223 (1995).

[40] *See, e.g.*, Laumann et al., *Social Organization of Sexuality*, *supra*, at 318; Blumstein & Schwartz, *supra*, at 236; *see also* D.P. McWhirter & A.M. Mattison, *The Male Couple: How Relationships Develop* 277 (1984); A.P. Bell & M.S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 328-330 (1978).

[41] *See* Blumstein & Schwartz, *supra*, at 237-240.

persons of different sexes or the same sex. Accordingly, understood from the perspective of the broad patterns of sexual activity in which couples engage in our society, oral and anal sex are not "deviate," but are normal and important means for many couples to develop bonds of sexual intimacy.

III. Antisodomy Statutes Like Section 21.06 Reinforce Prejudice, Discrimination, And Violence Against Gay Men And Lesbians

A. Discrimination, Prejudice, And Violence Encountered By Gay People

Lesbians and gay men in the United States encounter extensive prejudice, discrimination, and violence because of their sexual orientation.[42] Intense prejudice against gay men and lesbians was widespread throughout much of the 20th century; public opinion studies routinely showed that, among large segments of the public, gay people were the target of strong antipathy.[43] Although a shift in public opinion concerning homosexuality occurred in the 1990s,[44] hostility toward gay men and lesbians remains common in contempo-

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[42] *See generally, e.g.*, M.V.L. Badgett, *Money, Myths, And Change: The Economic Lives Of Lesbians And Gay Men* (2001); K.T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19 (G. Herek & K. Berrill eds., 1992); B. Perry, *In The Name Of Hate: Understanding Hate Crimes* 21-25 (2001); G.M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *Homosexuality: Research Implications*, *supra*, at 60; G.M. Herek, *The Psychology of Sexual Prejudice*, 9 Current Dirs. in Psychol. Sci. 19 (2000).

[43] *See* A.S. Yang, *Trends: Attitudes Toward Homosexuality*, 61 Pub. Opinion Q. 477 (1997); W. Schneider & I.A. Lewis, *The Straight Story On Homosexuality and Gay Rights*, 2/3 Pub. Opinion 16-20, 59-60 (1984); C. De Boer, *The Polls: Attitudes Toward Homosexuality*, 42 Pub. Opinion Q. 265 (1978); C.R. Wilcox & R. Wolpert, *Gay Rights in The Public Sphere: Public Opinion On Gay And Lesbian Equality*, in *The Politics Of Gay Rights* 409 (C.A. Rimmerman et al. eds. 2000).

[44] *See* K. Sherrill & A.S. Yang, *From Outlaws to In-Laws: Anti-Gay Attitudes Thaw*, 11 Pub. Persps. 20 (2000); A.S. Yang, *Trends*, *supra*.

rary American society.[45] Prejudice against bisexuals appears to exist at comparable levels.[46] Discrimination against gay people in employment and housing also appears to remain widespread.[47]

The severity of this anti-gay prejudice is reflected in the consistently high rate of anti-gay harassment and violence in American society. Numerous surveys indicate that verbal harassment and abuse are nearly universal experiences of gay people.[48] Although physical violence is less common, substantial numbers of gay people report having experienced crimes against their person or property because of their sexual orientation.[49] In 2001, the most recent year for which FBI statistics are available, there were 1,375 reported bias-motivated incidents against gay men, lesbians, and bisexuals.[50] That figure likely represents only a fraction of such crimes, because reporting of hate crimes by law enforcement agencies is voluntary, the thoroughness of police statistics differs widely among jurisdictions, and many victims do not report their experiences to police because they fear further harassment or lack confidence that the assailants will be caught.[51]

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[45] G.M. Herek, *Gender Gaps In Public Opinion About Lesbians and Gay Men*, 66 Pub. Opinion Q. 40 (2002); Sherrill & Yang, *supra*, at 21 (noting that "gay people remain the most systematically and intensely disliked of all the groups measured" in the ongoing American National Election Studies).

[46] G.M. Herek, *Heterosexuals' Attitudes Toward Bisexual Men And Women In The United States*, 39 J. Sex Res. 269 (2002)

[47] *See generally* M.V.L. Badgett, *Money, Myths and Change*, *supra*.

[48] *See* Berrill, *supra*, at 20 (in 24 surveys, median proportion of respondents who had been verbally harassed was 80%); *see also* Kaiser Family Foundation Report, *supra*, at 3 (in a random sample of 405 lesbians, gay men, and bisexuals from 15 major US metropolitan areas, 79% of lesbians and 82% of gay men reported having experienced verbal abuse, such as slurs or name-calling, because of their sexual orientation; A.R. D'Augelli & A.H. Grossman, *Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, and Bisexual Older Adults*, 16 J. Interpers. Viol. 1008, 1016-1017 (2001) (63% of 416 lesbian, gay, or bisexual adults, age 60 and older, reported experiencing verbal harassment because of their sexual orientation at least once); Herek et al., *Psychological Sequelae*, *supra*, at 948 (56% of 2,259 lesbian, gay, and bisexual survey respondents reported verbal harassment because of their sexual orientation in the previous year); G.M. Herek et al., *Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 12 J. Interpers. Viol. 195, 210 tbl. 5 (1997) (82% of 142 gay, lesbian, and bisexual respondents reported having experienced verbal abuse related to their sexual orientation since age 16); N.W. Pilkington & A.R. D'Augelli, *Victimization Of Lesbian, Gay, And Bisexual Youth In Community Settings*, 23 J. Community Psychol. 34-56 (1995) (80% of 193 respondents in a multi-state sample of adolescents and young adults reported experiencing verbal harassment related to their sexual orientation at least once).

[49] *See* Berrill, *supra*, at 20 (across 24 separate studies a median of 44% of gay, lesbian, and bisexual respondents reported having been threatened with violence because of their sexual orientation, 19% had their property vandalized, 17% had been physically assaulted); Herek et al., *Psychological Sequelae*, *supra*, at 947 tbl. 1 (in a community-based sample, 28% of 898 gay men and 19% of 980 lesbians had experienced an antigay crime in adulthood); Kaiser Family Foundation Report, *supra*, at 4 (32% of 405 lesbian, gay, and bisexual adults reported that they had been targeted for violence against their person or property because of their sexual orientation); Herek et al., *Hate Crime Victimization*, *supra*, at 202 (41% of respondents reported having experienced a crime against their person or property because of their sexual orientation, and another 9.5% reported an attempted crime); Pilkington & D'Augelli, *Victimization*, *supra*, at 41 tbl. 1 (18% of 193 lesbian, gay, and bisexual adolescents and young adults reported having been assaulted because of their sexual orientation).

[50] http://www.fbi.gov/ucr/01hate.pdf at 9 (visited Jan. 4, 2003).

[51] Herek et al., *Psychological Sequelae*, *supra*, at 947 (study of 2,259 gay men, lesbians, and bisexuals found that gay men had reported only 46% of hate-crime victimizations but 72% of other victimizations, and lesbians had reported only 36% of hate-crime victimizations but 68% of other victimizations). It also appears that, when gay people are subjected to violence based on their sexual orientation, they experience even greater psychological trauma than when they are subjected to other kinds of violent crime. *See id.* at 948-949 (gay men and lesbians who had experienced a crime against their person based on their sexual orientation manifested significantly higher levels of depressive symptoms, traumatic

Although homosexuality is not a mental disorder, this societal prejudice against gay men and lesbians can cause them real and substantial psychological harm. Research indicates that experiencing rejection, discrimination, and violence is associated with heightened psychological distress among gay men and lesbians.[52] These problems are exacerbated by the fact that, because of anti-gay stigma, gay men and lesbians have less access to social support and other resources that assist heterosexuals in coping with stress.[53]

Although many gay men and lesbians learn to cope with the social stigma against homosexuality, efforts to avoid that social stigma through attempts to conceal or dissimulate sexual orientation can be seriously damaging to the psychological well-being of gay people. Lesbians and gay men have been found to manifest better mental health to the extent that they feel positively about their sexual orientation and have integrated it into their lives through "coming out" and participating in the gay community.[54] Being able to disclose

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stress symptoms, anxiety, and anger, compared to lesbians and gay men who had experienced comparable crimes during the same time period that were unrelated to their sexual orientation); *see also* L.D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpers. Viol. 366 (1990).

[52] Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38 (1995); Herek et al., *Psychological Sequelae*, *supra*, at 947.

[53] *See* J. DiPlacido, *Minority Stress Among Lesbians, Gay Men, and Bisexuals: A Consequence of Heterosexism, Homophobia, and Stigmatization*, in *Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals* 138 (G.M. Herek ed. 1998); Cochran & Mays, *Relation Between Psychiatric Syndromes and Behaviorally Defined Sexual Orientation*, *supra*; S.D. Cochran & V.M. Mays, *Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners: Results from NHANES III*, 90 Am. J. Pub. Health 573 (2000).

[54] S.K. Hammersmith & M.S. Weinberg, *Homosexual Identity: Commitment, Adjustment and Significant Others*, 36 Sociometry 56 (1973); G.M. Herek & E.K. Glunt, *Identity and Community Among Gay*

one's sexual orientation to others also increases the availability of social support, which is crucial to mental health.[55]

B. The Role Of Antisodomy Statutes In Reinforcing Anti-Gay Prejudice

A particularly troubling effect of antisodomy statutes like § 21.06 is that they foster a climate of intolerance in which gay men and lesbians feel compelled to conceal or lie about their sexual orientation to avoid personal rejection, discrimination, and violence.[56] This compulsion to remain "in the closet" reinforces anti-gay prejudices. Research has consistently shown that prejudice against minorities, including

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and Bisexual Men in the AIDS Era: Preliminary Findings from the Sacramento Men's Health Study, in *AIDS, Identity, and Community: The HIV Epidemic and Lesbians and Gay Men* 55 (G.M. Herek & B. Greene eds. 1995); J. Leserman et al., *Gay Identification and Psychological Health in HIV-Positive and HIV-Negative Gay Men*, 24 J. Applied Soc. Psychol. 2193 (1994).

[55] Antisodomy statutes may also affect the physical health of gay men and lesbians by discouraging them from being honest about their sexual orientation. *See* Herek, *Why Tell If You're Not Asked*, *supra*, at 211-212. Research indicates that hiding or actively concealing significant aspects of the self can have negative effects on physical health, whereas disclosure of such information to others can have positive health outcomes. *See generally* J.M. Smyth & J.W. Pennebaker, *What Are The Health Effects Of Disclosure?*, in *Handbook Of Health Psychology* (A. Baum et al. eds. 2001). One study of HIV-negative gay men demonstrates the potential health risks associated with having to hide one's sexual orientation. Over a five-year period, the researchers observed that those men who concealed their homosexuality were approximately three times more likely to contract various infectious diseases and cancer than gay men who did not conceal their identity. By controlling for other factors, the researchers concluded that this dramatic difference resulted from the psychological inhibition of personal identity. *See* S.W. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 Health Psychol. 243 (1996).

[56] G.M. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism*, in *Hate Crimes*, *supra*, at 89; Herek, *Psychology of Sexual Prejudice*, *supra*.

gay people,[57] has been shown to decrease significantly when members of the majority group knowingly have contact with minority group members.[58] Consistent with this general pattern, empirical research demonstrates that having personal contact with an openly gay person is one of the most powerful influences on heterosexuals' tolerance and acceptance of gay people. Anti-gay attitudes are significantly less common among members of the population who report having a close friend or family member who is gay or lesbian.[59] Prejudice tends to be lower when a lesbian or gay friend or family member has directly disclosed her or his sexual orientation to a heterosexual person, compared to when the former's sexual orientation has not been directly discussed.[60] Such disclo-

[57] As noted in social psychological textbooks, although the specific content of prejudice varies across different minority groups, the psychological dynamics of prejudice are similar regardless of the group toward which that prejudice is directed. *See, e.g.*, S. L. Franzoi, *Social Psychology* 232-274 (3d ed. 2003); K.J. Gergen & M.M. Gergen, *Social Psychology* 140-141 (1981).

[58] A meta-analysis of hundreds of studies of contact and prejudice based on sexual orientation, nationality, race, age, and disability found a highly robust inverse relationship between contact and prejudice. That analysis also found that more rigorous studies (based on observed contact rather than reported contact) yielded greater effects, that contact changed attitudes towards the entire "outgroup" (not just towards those individuals with whom subjects had contact), and that majority group participants experienced greater changes in attitude than minority group members. *See* T.F. Pettigrew & L. Tropp, *Does Intergroup Contact Reduce Prejudice?*, in *Reducing Prejudice and Discrimination: Social Psychological Perspectives* 93 (S. Oskamp ed. 2000).

[59] *See* G.M. Herek & J.P. Capitanio, *"Some Of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Social Psychol. Bull. 412 (1996); G.M. Herek & E.K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. Sex Res. 239 (1993); *Familiarity Encourages Acceptance*, 11 Pub. Perspective 31 (2000); Schneider & Lewis, *The Straight Story*, *supra*, at 16-20, 59-60.

[60] Herek & Capitanio, *Some of My Best Friends*, *supra*, at 416.

sure, however, is often inhibited by fears of prejudice, social ostracism, discrimination, and violence.[61] By reinforcing such stigma, antisodomy laws help to deter gay people from disclosing their sexual orientation; that silence prevents heterosexuals from interacting with openly gay people, which in turn reinforces anti-gay prejudice.

Finally, by discouraging gay people from disclosing their sexual orientation, antisodomy statutes impair the effectiveness of laws and law enforcement initiatives designed to deter violent crimes against gay men and lesbians.[62] For such laws to be effective, victims must be willing to volunteer information to law enforcement authorities that would indicate the crime is bias-related. A substantial proportion of gay people who are victimized in anti-gay crimes, however, do not inform the police. Concerns about stigmatization resulting from public disclosure of sexual orientation influence the decision of gay crime victims whether to report a crime. Gay crime victims also often perceive a risk of "secondary victimization" by police and law enforcement officials who learn about the victim's sexual orientation.[63] Thus, not only do antisodomy statutes discourage gay people from undertaking the steps necessary to overcome social prejudice (revealing their sexual orientation to acquaintances), they also deter gay people from seeking legal redress when they are directly

[61] Herek, *Why Tell If You're Not Asked?*, *supra*, at 198-209.

[62] *See, e.g.*, Hate Crimes Statistics Act, Pub. L. No. 101-275, codified at 28 U.S.C. § 534 note, *as amended*, Pub. L. No. 104-155 (mandating collection of data for crimes based on race, ethnicity, religion, disability, and sexual orientation); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, codified at 28 U.S.C. § 994 note (mandating enhanced sentences for federal hate crimes, including crimes based on victim's actual or perceived sexual orientation).

[63] *See* G.M. Herek et al., *Victim Experiences in Hate Crimes Based on Sexual Orientation*, 58 J. Social Issues 319-339 (2002); G.M. Herek & K.T. Berrill, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, in *Hate Crimes*, *supra*, at 289-305.

and severely injured by violent manifestations of that prejudice.

CONCLUSION

The judgment of the Texas Court of Appeals should be reversed, and the criminal proceedings against petitioners should be dismissed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 2002

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

—v.—

TEXAS,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 300,000 members that is dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Texas is one of its state affiliates. This case raises issues of profound importance to the ACLU and its members. The ACLU has long opposed both discrimination based on sexual orientation and government efforts to regulate sexual intimacy between consenting adults within the privacy of the home. In support of these principles, the ACLU has appeared before this Court on numerous occasions, including as counsel for respondent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and as co-counsel for respondents in *Romer v. Evans*, 517 U.S. 620 (1996). Although mindful of the principles of *stare decisis*, the ACLU respectfully submits that *Bowers* was wrongly decided and should now be overruled. This brief therefore focuses on that question.

STATEMENT OF THE CASE

Responding to a false report of a weapons disturbance, police entered John Lawrence's home and found Lawrence and Tyron Garner being sexually intimate. The police arrested and jailed them for violating Texas Penal Code § 21.06, which criminalizes "deviate sexual intercourse" (defined to include oral or anal sex) for a same-sex couple but not for an opposite-sex couple. Despite Petitioners' argument that § 21.06 violates federal constitutional guarantees of privacy and equal protection, the Texas Court of Appeals affirmed the convictions and the Texas Court of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Criminal Appeals denied review. Petition for *Certiorari* at App. 1a-4a, 86a-141a, *Lawrence v. Texas*, 71 U.S.L.W. 3116 (filed July 16, 2002) (No. 02-102). This Court granted *certiorari*. 71 U.S.L.W. 3116 (Dec. 2, 2002).

SUMMARY OF ARGUMENT

The laws of Texas and 12 other states criminalize sexual intimacy between consenting adults in the privacy of the bedroom. The substantive limits on government power inherent our constitutional system mean that the details of such private, consensual sexual intimacy are matters for individuals to decide, not for the state to police. Yet the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that the Constitution presented no barrier to this intrusion by the state.

Bowers is an anomaly that ill fits this Court's privacy jurisprudence, which places private consensual intimacies squarely within the zone of protected liberty. The *Bowers* decision ignored the principles that shape that zone of liberty and relied on an incomplete and therefore inaccurate understanding of history. A fuller exploration of the nation's history and tradition shows a long-standing practice of not applying sodomy laws to consensual acts between adults in private. This tradition of calculated application reflects the contours of the liberty protected by the Constitution.

Guided by the Court's enduring precedents addressing constitutional privacy, by the "basic values that underlie our society," *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and by a more accurate understanding of history, *id.*, the Court should overrule *Bowers*. It should hold that the Due Process Clause both protects the liberty of consenting adults to decide what sexual intimacies they will share in private and subjects state regulation of such decisions to strict scrutiny.

Unlike cases where the Court properly adheres to an existing precedent despite its flaws, here there is no reason to shy away from righting a manifest constitutional error. Overruling *Bowers*, a decision that certainly has not become imbedded in the "national culture," *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000), would disturb no reliance interests, but instead would bring coherence to the Court's privacy jurisprudence. *Bowers* is an outlier that can and should be overruled.

ARGUMENT

BOWERS v. HARDWICK WAS WRONGLY DECIDED AND SHOULD BE OVERRULED

A. Private, Consensual Sexual Intimacy Between Adults Falls Within The Zone of Liberty Specially Protected By The Constitution

The assertion by the State of Texas that its police may intrude into a person's bedroom to regulate the details of his most intimate interactions with another adult strikes at the core of the liberty protected by the Due Process Clause of the Fourteenth Amendment. The principles animating the Court's privacy cases, both before and after *Bowers*, easily encompass the liberty of private, consensual sexual intimacy between adults. Indeed, it is only a unifying principle of personal autonomy that serves to limit an otherwise boundless, tyrannical state power over every detail of personal life. And only such a unifying principle renders this Court's privacy decisions a coherent whole, instead of a series of disjointed pin-points of constitutional protection unconnected by principle or logic. Just such a cramped understanding of the principles of autonomy, of the Court's earlier cases, and of our nation's history, lies at the heart of the error in *Bowers v. Hardwick*.

It is by now a commonplace that the precise contours of the liberty protected by the Due Process Clause have never "been reduced to any formula" or "determined by reference to any code," *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting). Nevertheless, the Court is not without guideposts in defining those contours—guideposts that include this Court's existing corpus of privacy decisions, the postulates underlying those rulings, and the history of conscious non-application in private settings of laws ostensibly regulating a range of sexual intimacies. These guideposts provide the proper framework for determining the scope of the liberty at stake in this case and dictate the fate of the sodomy statute challenged here.

1. Protection Of Consensual Sexual Intimacy In The Home Is Compelled By The Court's Privacy Cases

The Court's privacy cases recognize a fundamental right on the part of consenting adults to form and conduct intimate personal relationships within the protective shelter of the home. Thus, the government must provide a compelling justification before it may dictate the content of personal decisions regarding sexual intimacy, including decisions about whether to have sex for procreation or for fulfillment,[2] and whether to have an abortion or carry a pregnancy to term.[3] This associational aspect of the autonomy right also protects the freedom to determine the nature of family and other intimate relationships, including whether and whom to

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[2] *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (protecting liberty interest in sexual intimacy within marriage), *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (protecting liberty interest in sexual intimacy outside of marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977). Another strand of the privacy right recognizes the related right to bodily integrity. *See, e.g., Rochin v. California*, 342 U.S. 165 (1952).

[3] *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833 (1992).

marry,[4] how to raise one's children,[5] and with what family members to share one's home.[6] The Court has recognized a spatial dimension to the privacy right as well—a dimension that specially protects the home, and one's activities there, from unwarranted intrusion by the government.[7]

The liberty that is so sharply invaded by this Texas statute thus stands at the intersection of several distinct axes of this recognized privacy right: it involves sexual intimacy, it affects the ability to form close-knit personal associations according to one's own lights, and it occurs in the home. The right at stake here therefore does not fall outside the outer boundaries of the Fourteenth Amendment, as the Court in *Bowers* suggested, but instead lies near its very center.

a) Liberty Embraces Associational Intimacy

In its cases involving sexual intimacy, the Court has recognized a liberty that cannot be distinguished in a

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[4] *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing liberty interest in marriage); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1972).

[5] *See Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) (protecting parent's right to control child's rearing and education); *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35 (1925) (same); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing in *dictum* "the private realm of family life which the state cannot enter"); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion) (reaffirming parent's liberty interest in controlling upbringing of children).

[6] *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504-06 (1977) (plurality opinion).

[7] *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (protecting right to read even obscene materials unprotected by the First Amendment in the privacy of the home); *Moore*, 431 U.S. at 499-502 (plurality opinion) (protecting right of family members to live together in the home); *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) ("[I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within.").

principled way from that of private, consensual, adult sexual intimacy, which the Texas statute invades. This Court's repeated invalidation of restrictions on the use of contraceptives, *see Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977), involved more than a right to employ a drug or device; it necessarily entailed a more generalized right to engage in sexual intimacy, including that between unmarried persons and for purposes other than procreation.

Although the privacy right originally recognized in *Griswold* was grounded in the marital relationship, it was quickly and explicitly broadened in *Eisenstadt* to cover unmarried individuals. 405 U.S. at 453; *see also Carey*, 431 U.S. at 685. Thus, the sexual intimacy at issue here cannot be carved out of the zone of protected liberty simply because the individuals involved are not married to one another.

Procreation is also not at the core of the right recognized in *Griswold* and *Eisenstadt*. The statute challenged in *Griswold* did not tell the citizens of Connecticut either that they had to procreate or that they must not. Instead, Connecticut told them that they could not have sex unless it was with full risk of procreation. The question for the Court in *Griswold* was whether individuals had a right to engage in sex for pleasure and fulfillment instead of for procreation. The Court of course recognized just that right.

It would be particularly incoherent—indeed, perverse—to limit the right to engage in *non*-procreative sex to couples who *could* procreate if they so chose. Surely an individual's sudden loss of the physical capacity to procreate could not justify the government's insistence that her sexual intimacy must stop. A woman past the age of menopause or one who is already pregnant is capable of *non*-procreative sex only; surely her right to engage in sexual intimacy remains undiminished nevertheless. The same must be true of an infertile heterosexual couple. And, from the perspective of

sexual intimacy unlinked to any prospect of procreation, a same-sex couple is no different. The right that emerges from the contraception cases is a right to engage in private sexual intimacy with another adult, regardless of marriage and regardless of whether the intimacy could otherwise result in procreation. *See Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 857 (1992) (plurality opinion) (discussing "the liberty relating to *intimate relationships*, the family, and decisions about whether or not beget or bear a child") (emphasis added); *Carey*, 431 U.S. at 685 (invalidating regulation of a "field that by definition concerns the most intimate of human activities and relationships"—namely, sexual activities and relationships). That is precisely the right Texas has invaded here.[8]

Bowers distinguished the Court's prior privacy cases as being limited to situations involving "family, marriage or procreation," with which "homosexual activity" had "no connection." 478 U.S. at 191. The Court's reasoning was simply wrong. First, as explained above, the Court's prior decisions were not limited to either marriage or procreation, but instead protected the right to sexual intimacy even among unmarried individuals who engage in non-procreative sex.

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[8] Justice Stevens' concurring opinion in *Carey* suggests that criminalizing the provision of contraceptives offends substantive due process because, whatever its power to outlaw the underlying sex act, a state that threatens someone with pregnancy as the price for engaging in a sex act has acted irrationally. 431 U.S. at 715-16. It detracts not a bit from the wisdom of that insight to say that it contained only a partial explanation of the precedents. The right to use contraceptives is obviously about more than the cruelty of unwanted pregnancy. Among other things, if *Griswold* and its progeny were based only on that reasoning, then the right they announced would apply only to women.

Second, to the extent the Court's other privacy cases focus on family or other intimate associational ties,[9] they apply fully here. Lesbians and gay men, no less than other individuals, center their lives around close-knit emotional bonds.[10] As adults, they form intimate relationships with one another, often have or adopt children, and interact with groups of relatives that make up their extended families.[11] The Court has recently recognized that the "composition of families varies greatly from household to household," making "it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). The Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life." *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545-46 (1987) (internal quotations marks omitted).

Protecting such "highly personal," intimate relationships from "unjustified interference by the State" is one means of "foster[ing] diversity," nurturing the autonomous development of values and ideals, and providing a "critical buffer[] between the individual and the power of the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 619 (1984) (recognizing the vital importance of this protection because "individuals draw much of their emotional enrichment from close ties with others"); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (protecting "freedom of personal choice in matters of . . . family life" as one of the constitutionally protected "liberties"). Preventing government intrusion into the foundations of such core relationships is therefore central to an "Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968); *see also Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

b) Liberty Is Especially Protected In The Home

That the sexual intimacy that made John Lawrence a criminal in Texas occurred within his home brings the interest at stake here under a separate and equally compelling aspect of the Court's privacy cases. "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights." *United States v. Orito*, 413 U.S. 139, 142 (1973); *see Griswold*, 381 U.S. at 484 (the Fourth and Fifth Amendments protect against "governmental invasions of the sanctity of a man's home and the privacies of life.") (internal quotations omitted). Allowing the government to send its officers into people's bedrooms, in the "innermost sanctum of the home," to police the details of private consensual sexual intimacy invades a realm of "privacy that is implicit in a free society." *Poe v. Ullman*, 367 U.S. 497, 520-21 (1961) (Douglas, J.,

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[9] Of course, the Court has recognized substantive due process liberty interests that have no apparent connection to family, marriage, or procreation. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing liberty interest in refusing medical treatment); *Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (recognizing liberty interest of prisoners in avoiding the unwanted administration of antipsychotic drugs).

[10] *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 63 (1973) (recognizing that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality"); *Eisenstadt*, 405 U.S. at 453; *Griswold*, 381 U.S. at 485-86.

[11] The 2000 Census figures, which document over 600,000 households of unmarried same-sex partners in the United States, living in 99.3% of American counties, illustrate the prevalence of same-sex couples in America today. David M. Smith and Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households* at 1-2 and Tables 1, 4 (Aug. 21, 2001), *available at* www.hrc.org/familynet/documents/L%census.pdf.

dissenting); *see also Griswold*, 381 U.S. at 485-86 (search of private bedroom for "telltale signs" of contraceptive use would violate right to privacy). When a state wishes to reach into the home, whether to search its contents or to regiment the details of what goes on within, it invades a protected realm and must provide significant justification.

The home protects us from unwarranted government surveillance in significant part to "provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference." *Oliver v. United States*, 466 U.S. 170, 179 (1984); *see Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.") (emphasis in original). This Court has thus held that the state cannot criminalize the private possession of obscene materials in the home, even when those materials are unprotected by the First Amendment and the state could penalize their public dissemination or acquisition. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969). As this Court has repeatedly held, rights protected by other provisions of the Constitution "take[] on an added dimension" in the privacy of the home, given the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions" into that sanctum. *Id.* at 564.

It would be ironic indeed if government were constitutionally barred from entering a man's home to stop him from obtaining sexual gratification by viewing an obscene film—but were free, without any burden of special justification, to enter the same dwelling to interrupt his sexual intimacy with a willing adult partner. Given the importance of intimate relationships to all our lives, they certainly deserve at least as much protection from government interference as that recognized in *Stanley*.

The *Bowers* Court erred when it "close[d] [its] eyes to the *basic reasons why* certain rights . . . have been accorded shelter under the Fourteenth Amendment's Due Process Clause," *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion) (emphasis added)—namely, that certain aspects of human relationships, including sexual intimacy, are so personal, fundamental, and private that government has no business usurping them. The line that already appears in the Court's autonomy cases—allocating decisionmaking about consensual adult sexual intimacy in the home to the individual rather than the state—preserves and reflects that common understanding of the proper spheres for government and for individual decisionmaking. Reliance on this common understanding provides the kind of "objective considerations," *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998) (Kennedy, J., joined by O'Connor, J., concurring), that exemplify a principled approach to the Due Process Clause.

2. History And Tradition Show That Americans Have A Fundamental Right To Be Free From Government Regulation Of Consensual Sexual Conduct In The Home

The Due Process Clause specially protects those freedoms that are "deeply rooted in this Nation's history and tradition," *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), or that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

History and tradition are neither the sole nor necessarily the dispositive factor in due process analysis.[12] But in this

[12] As Justice Kennedy has observed, "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., joined by O'Connor, J., concurring); *see also*

case, a thorough review of American history shows that, at least since the Revolution, Americans have believed that government has no place in the bedrooms of consenting adults. A crucial error in the *Bowers* decision was the majority's flawed reconstruction of that history. *See* 478 U.S. at 192-94; *id.* at 196-97 (Burger, C.J., concurring).

Laws banning sodomy have indeed existed for centuries. But until quite recently, American sodomy laws were not aimed at lesbians and gay men at all. Instead, they prohibited all sodomy, regardless of the sex of the participants,[13] because sodomy was considered a sin against *procreation*, not an offense against *heterosexuality*.[14]

Planned Parenthood of S.E. Pa., Inc. v. Casey, 505 U.S. 833, 848 (1992) (plurality opinion) (stating that "[n]either the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects," and citing the "rational continuum" language from Justice Harlan's dissent in *Poe v. Ullman*).

[13] William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631, 643-46 (1999) (discussing early definitions of sodomy in America); John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 30 (1988). It was not until 1969 that any state singled out same-sex sexual activity for criminal prohibition, and only nine states ever did so. *Id.* at 664-65; *see infra* note 48.

[14] Nan Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 533 (1992) ("The crime of sodomy originated in ecclesiastical regulation of a range of nonmarital, nonprocreative sexual practices. Nonprocreation was the central offense and the core of the crime."); Eskridge, *Historiography*, *supra* note 13, at 647; D'Emilio & Freedman, *supra* note 13, at 30. Thus, the long-standing criminalization of "homosexual sodomy" relied upon by the *Bowers* majority, 478 U.S. at 192-94, was in fact not a special legal condemnation of gay sex at all, but a condemnation of non-procreative sex in general. Proper recognition of this fact in *Bowers* should have revealed at once the great difficulty of reconciling the right to have sex while using contraceptives with the ban on sodomy. *See supra* Point A.1.a.

More critically, sodomy laws have almost always been applied in cases involving children, the use of force, public sex, or prostitution. From as early as the post-Revolutionary period, states have very rarely applied laws banning sodomy, fornication, or adultery to consenting adults in private. This history of non-enforcement in private contexts affirmatively shows that American society has long respected the individual's freedom to engage in consensual adult sexual intimacy in private, even while the law has *nominally* covered such intimacy.

The State of Texas, for example, admitted as recently as 1994 that it had never prosecuted consenting adults for sodomy in private,[15] and several other states have made similar concessions.[16] A review of reported appellate decisions confirms that there have been no prosecutions by the State of Texas that were plainly based on private,

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[15] *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994) (reporting position of Texas Attorney General that "there is no record of even a single instance in which the sodomy statute has been prosecuted against [private consensual] conduct.[between adults].").

[16] *See Sanchez v. Secretario de Justicia*, __ D.P.R. __, No. AC-2000-63, 2002 WL 1581480 (P.R. June 28, 2002) (noting that sodomy law has not been enforced against private consensual sodomy between adults in its more than 100 years of existence); *Jegley v. Picado*, 80 S.W.3d 332, 337 (Ark. 2002) (state "points out that no reported Arkansas case in the past '50+ years' reveals a prosecution under the sodomy statute for private, consensual conduct violating the statute."); *Gryczan v. State*, 942 P.2d 112, 118 (Mont. 1997) ("[T]he statute has never been enforced against consenting adults."); *Williams v. Glendening*, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998) (state did not prosecute individuals for private, consensual sodomy between adults). In 1996, the Tennessee Attorney General asserted that there had been no showing "that there have been any arrests for purely private, consensual, adult, sexual activity" under Tennessee's sodomy law. *Campbell v. Sundquist*, 926 S.W.2d 250, 255 (Tenn. 1996) (noting that all recorded arrests for violation of the sodomy law involved "public activity" or a "juvenile," or their public vs. private nature was "unknown.").

consensual adult sodomy in the home other than this one.[17] Reported decisions in other jurisdictions show that prosecutions for private consensual intimacy have been exceedingly rare.[18] Likewise, scholars find almost no such

[17] We found 191 reported appellate decisions in Texas involving charges of non-aggravated sodomy (using various terminology), ranging from 1867 to 1992. Of these, 55 involved children, 37 were assaults, 12 involved sex in public, 14 involved bestiality, and 73 were "unclear" cases where the opinion did not reveal the circumstances of the crime, including whether the offending conduct occurred in public or private, was consensual or forced, or was with an adult or a minor. The unclear cases are mostly older, when opinions typically provided little or no detail.

[18] Reviewing reported appellate decisions involving prosecutions for non-aggravated sodomy in the original thirteen states, we found the same pattern of non-enforcement in private, consensual contexts: In Massachusetts, we found 75 prosecutions from 1869 to 2002, of which seven were unclear and none involved consensual sex between adults in private. In New Hampshire, we found five prosecutions, from 1941 to 1975, two of which were unclear and none of which involved private, consensual conduct. In Rhode Island, we found 12 prosecutions from 1970 to 1999, one of which was unclear and the rest involved children, assault, or public sex. In Connecticut, we found five prosecutions, from 1967 to 1976, all of which involved assaults. In New York, we found 216 prosecutions from 1893 to 1980 (when New York struck down its consensual sodomy law, *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980)), of which 36 were unclear and only *Onofre* involved private consensual conduct. In New Jersey, we found 11 prosecutions, from 1923 to 1979, seven of which involved assaults and four of which involved children. In Pennsylvania, we found 39 prosecutions, from 1916 to 1992, four of which were unclear and none of which involved private, consensual conduct. In Delaware, we found four prosecutions, from 1915 to 1962, one of which involved public sex and three of which were unclear. In Maryland, we found 99 prosecutions, from 1810 to 2000, of which five were unclear and none involved private, consensual conduct. In Virginia, we found 21 prosecutions, from 1812 to 2001, none of which were plainly private and consensual and three of which were unclear. In North Carolina, we found 48 prosecutions, from 1901 to 2002, eight of which were unclear and only one of which appears to involve private, consensual conduct. *State v. O'Keefe*, 138 S.E.2d 767 (N.C. 1964). In South Carolina, we found two prosecutions, one in 1955 that involved a

prosecutions in the 19th century,[19] and, as Judge Posner has observed, "no nation in modern times—not even Nazi Germany or communist Cuba—has made systematic efforts to discover and punish [sodomy] when conducted in private."[20] Laws criminalizing fornication have also not been applied in private contexts.[21]

child and one in 1996 that involved an assault. In Georgia, we found 76 prosecutions for non-aggravated sodomy, ranging from 1884 through 2002, of which 10 were unclear. At the time it was decided, *Bowers* was the first reported case in Georgia involving an arrest for private, consensual sodomy. Of course, the State of Georgia did *not* prosecute Michael Hardwick, instead choosing not to present the matter to a grand jury. *Bowers*, 478 U.S. at 189; *id.* at 198 (Powell, J., concurring). Since then, one reported case involved an arrest based on an invitation to commit sodomy in private. *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996).

[19] *See* William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1015 (1997) (finding no reported cases involving convictions for private, consensual sodomy in the 19th century before 1880); Drew Page, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the* Solem *v.* Helm *Test*, 56 U. Chi. L. Rev. 367, 390 (1989) ("[A]lmost all the reported cases involving sentences for sodomy also involve punishment for other crimes like rape, forcible sodomy, or public indecency."); George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940, 140 (1994) (noting that New York State "had done little to enforce the sodomy law in the first century of independence," and that there were only 22 reported prosecutions for sodomy in New York City in the nearly eight decades from 1796-1873, the details of which (private vs. public, consensual vs. forced, adult vs. child) are not discussed).

[20] Richard A. Posner, Sex and Reason 207 (1992); *see also* Richard A. Posner and Katharine B. Silbaugh, A Guide to America's Sex Laws 66 (1998) ("Prosecutions for sodomy today are almost entirely limited to either sexual conduct in a public place . . . or sexual conduct involving force or lack of consent where a sexual assault charge would be difficult to prove.").

[21] For example, Virginia has not prosecuted anyone for fornication since 1849. *Doe v. Durling*, 782 F.2d 1202, 1206 (4th Cir. 1986).

A very different picture emerges in the Colonial period, roughly 1600 to 1776, when the state was intimately involved in policing private behavior. Colonial law was essentially religious law, and "all crime was . . . synonymous with sin."[22] Colonial Protestants emphasized the importance of sexuality within marriage but condemned all sex that "occurred outside of marriage and for purposes other than reproduction."[23] Colonial law in both New England and the Chesapeake outlawed fornication, adultery, and sodomy,[24] sometimes with a penalty of death.[25]

The Colonial period's regulation of private, non-marital sexual acts

> depended upon the extensive involvement of community members in each others' lives. Intrusiveness [so] characterized the attitude toward sexuality . . . [that] individuals could not easily engage in illicit sexual activities without being noticed. Among Puritans, each community member had responsibility for upholding the morality of all lest God punish the group as a whole. . . . So clear was the responsibility of family and neighbors to help regulate sexuality that a New England father who allowed his son to live with an unmarried woman was charged as an 'accessory to fornication.'[26]

Colonists even testified about the sexual activities of their neighbors, "illustrating an acceptance of intrusiveness in what would later come to be considered purely private matters."[27]

Starting about the time of the American Revolution, state governments began taking a much more hands-off attitude toward regulation of private sexuality, leaving "the task of sexual regulation . . . largely to the family."[28] Whether because the society became more focused on "property rather than morals offenses,"[29] or as a facet of the separation of church and state,[30] it is clear that courts and legislatures largely "abandon[ed] . . . the prerevolutionary notion that government should act to enforce morality."[31] While "sexual

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There are only two reported convictions for fornication in Minnesota, the last one in 1927. *Cooper v. French*, 460 N.W.2d 2, 19 (Minn. 1990). The most recent Illinois appellate court record of a successful fornication prosecution was in 1916. *Mister v. A.R.K. Partnership*, 553 N.E.2d 1152 (Ill. App. 1990) (citing *People v. Green*, 114 N.E. 518 (Ill. 1916)).

[22] William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society: 1760-1830, 39 (1975). Sins that were also crimes ranged from breaching the Sabbath by missing church or working on Sunday to engaging in premarital or extra-marital sexual behavior. *Id.* at 37-38.

[23] D'Emilio & Freedman, *supra* note 13, at 4.

[24] *Id.* at 18. However, in this period most colonies had no laws regulating sex between two women, mutual masturbation, or oral sex. Eskridge, *Historiography*, *supra* note 13, at 644-45.

[25] Sodomy, and adultery in some colonies, carried the death penalty in the early Colonial period, *see* D'Emilio & Freedman, *supra* note 13, at 30; Cornelia Hughes Dayton, Women Before the Bar: Gender, Law and Society in Connecticut 1639-1789, 163 (1995), but by the 1700s most states had eliminated the death penalty for both crimes, D'Emilio & Freedman, *supra* note 13, at 30; Eskridge, *Historiography*, *supra* note 13, at 645.

[26] D'Emilio & Freedman, *supra* note 13, at 29 (footnotes omitted).

[27] *Id.*; *see also id.* at 27 ("Church and court records reveal the extensive efforts colonists made to identify, outlaw, and punish" "adultery, sodomy, incest, or rape.").

[28] *Id.* at 66-67.

[29] *Id.* at 67.

[30] *Id.* (discussing increasing secularization of government as well as the shift in control of sexuality from clergy to doctors).

[31] Nelson, *supra* note 22, at 111; *see also* Dayton, *supra* note 25, at 159-60 ("By midcentury [1750], new attitudes . . . had pushed aside the Puritan obsession with pressuring all sinners to acknowledge immoral behavior in the most public setting possible. Gradually, the regulation of

offenses still violated religious and familial codes, . . . they were not viewed, as they had been earlier, as challenges to the stability and survival of the state. The family, in other words, had acquired more privacy."[32]

The late 18th century shift away from government regulation of private intimacy resulted in a sharp decline in the enforcement of morals offenses, including laws proscribing consensual sexual acts such as fornication and adultery.[33] For example, during the 15 years prior to the Revolution, Massachusetts prosecuted an average of 72 sexual offenses a year, nearly all for fornication. After 1790, there are only four such prosecutions ever reported in the entire Commonwealth.[34] Similar changes occurred in Connecticut: the New Haven County Court heard 112 prosecutions for fornication—its largest number—from 1730-39, but that number dropped to three for the period 1780-89.[35]

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moral behavior was withdrawn from the purview of the community-embodied-in-the-court and lodged in the more informal and amorphous setting of family and neighborhood.").

[32] Mary Beth Norton, *The Evolution of White Women's Experiences in Early America*, 89 Am. Hist. Rev. 593, 612 (1984).

[33] Nelson, *supra* note 22, at 110; *see also* D'Emilio and Freedman, *supra* note 13, at 38. No analogous change in the frequency of sodomy prosecutions is apparent because there was never a large volume of such prosecutions, even during the Colonial period. Eskridge, *Historiography*, *supra* note 13, at 645 ("Altogether there are records for perhaps as many as twenty sodomy prosecutions and four executions during the colonial period.").

[34] Nelson, *supra* note 22, at 110.

[35] Dayton, *supra* note 25, Tables 7, 8, at 182-83. By the end of the 18th century, fornication cases ceased to be matters of criminal prosecution; instead, unmarried pregnant women were treated not as criminals but as complainants in paternity suits. *Id.* at 161.

The removal of government from regulation of private intimacy in the home endured throughout the 19th and 20th Centuries and is evident in the almost complete lack of prosecutions for sodomy, fornication, or adultery in private settings after the late 1700s.[36] While the American public of course continued to debate moral issues,[37] with few exceptions its concern with morals did not manifest itself in prosecutions for private consensual sexual intimacy.[38] Even

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[36] *See supra* notes 15-20.

[37] For example, so-called "Comstock Laws," which prohibited the mailing of "obscene literature," *see, e.g.*, Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873), were enacted in Congress and in many states starting in 1873. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 748-51 (1992). By their very terms, however, those laws did not address sexual acts, such as sodomy, fornication, or adultery, and resulted in no prosecutions for such private activity in the home.

With the increasing urbanization of America in the late 1800s, prostitution became more widespread, as did efforts to combat it, including through regulation of "bawdy houses." Eskridge, *Historiography*, *supra* note 13, at 650. Notably, prosecutions under these laws also would not have addressed sodomy, fornication, or adultery in private, non-commercial settings.

And the Mann Act, 18 U.S.C. § 2421 (1948), known as the White Slave Traffic Act, made it a federal crime to transport women in interstate commerce for prostitution or any "immoral" acts. During a brief period, the Mann Act was enforced against men who transported women across state lines for non-commercial "immoral" acts. David J. Langum, Crossing Over the Line: Legislating Morality and the Mann Act 161 (1996). But at the time, these were not considered consensual sexual acts, as the Act, which applied only to men, paternalistically presumed that the women were unwitting participants, manipulated by men. *Id.* at 10. By the end of the 1920's, the non-commercial prosecutions had ceased, except for occasional selective use against unpopular groups, including gangsters, African-American men who were found with white women, and people with politically unpopular views. *Id.* at 161-97.

[38] *See supra* notes 15-20.

when the number of overall sodomy prosecutions increased, such as during the "purity crusades" of the late 1800s, and during the post-World War II McCarthy period, during which police vice squads sought to stamp out "immoral" sexual activity, prosecutions for sodomy focused on forcible sex, sex for hire, or sex in public, rather than consensual sex in the privacy of the home.[39]

The Colonial experience shows that the later lack of enforcement in private does not result from any inability of police or prosecutors to discover the illegal conduct. People have long been aware that their neighbors, friends, and family engaged in consensual sexual intimacies in private, in undoubted violation of various sodomy, fornication, and/or adultery laws. And people who love members of the same sex have hardly been invisible, in either 19th century, 20th century, or contemporary America.[40] The very fact that people do not report the sexual activities of their neighbors and acquaintances and have not done so for a very long time underscores the degree to which our national culture has

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[39] *See* Eskridge, *Historiography*, *supra* note 13, at 650-54 (discussing general concern in 1880s with immorality and consequent rise in prosecution for sodomy, almost all of which occurred in public, involved children, or was prostitution); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet*, 1946-61, 24 Fla. St. U. L. Rev. 703, 717-20 (1997) (discussing McCarthy-era dragnets). Most arrests in these dragnets were not for sodomy, but rather for indecency, public lewdness, or loitering. Of the arrests for sodomy, Eskridge estimates that most involved commercial or coerced sex acts, with only about 20-25% involving consensual sex. Eskridge, *Privacy Jurisprudence*, at 725. And the arrests for consensual sodomy generally involved sex, or solicitations for sex, in public places such as bars, theaters, steam baths and public restrooms. *Id.* at 717-20. Furthermore, the few prosecutions that are recorded were almost invariably triggered by conduct that was flagrant or notorious, bringing the offense to public attention and therefore not involving truly private conduct.

[40] *See generally* Chauncey, *supra* note 19 (discussing high degree of visibility of gay men in cities starting in the late 1800s).

broadly embraced the belief that private consensual acts are ordinarily none of the government's business.[41]

Consistent with this view, the long-standing practice of not enforcing sodomy laws against private consensual conduct was transformed in the 20th century into a formal recognition that regulation of private sexual conduct simply was not a proper role for government. Thus, in 1955, when the American Law Institute approved its Model Penal Code, it contained "no criminal penalties for consensual sexual relations conducted in private." American Law Institute, Model Penal Code § 213.2 cmt. 2, at 372 (1980).

In the wake of the Model Penal Code, many states brought the text of their sodomy laws into compliance with their practice of non-enforcement. In 1961, Illinois became the first state to revise its criminal laws in accordance with the Code, including the elimination of the crime of consensual sodomy.[42] Since then, 36 additional states have repudiated their laws against consensual sodomy, either by

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[41] In *Fort v. Fort*, 425 N.E.2d 754, 758 (Mass. App. 1981), the court recognized the same phenomenon in the context of fornication and adultery:

> We are not speaking here of a condition of merely sporadic enforcement, explainable, perhaps, by limited police resources or difficulties in securing evidence. . . . Except for traffic offenses, it is difficult to think of any crimes of which evidence comes to the attention of law enforcement officials with greater regularity, whether through divorce actions which are based on, or otherwise concern, marital infidelities; paternity suits; . . . public assistance programs which aid unmarried mothers; publicly administered child protection and adoption programs; publicly funded abortions . . . . Despite widespread official knowledge of such violations, prosecutions by law enforcement officials are essentially non-existent.

[42] Eskridge, *Historiography*, *supra* note 13, at 662.

legislative repeal or by judicial invalidation.[43] *See Washington v. Glucksberg*, 521 U.S. 702, 716-719 (1997) (analyzing contemporary, as well as historical, attitudes toward conduct claimed to be protected as a liberty interest).

Recent state court decisions striking down sodomy laws reflect the social consensus that the state should not intrude into the most intimate of personal decisions in the home. *See, e.g., Jegley v. Picado*, 80 S.W.3d 332, 354 (Ark. 2002) (Brown, J., concurring) ("If anything has been sacrosanct over the past hundred and fifty years . . ., it is the principle that a person's home is his castle. . . . If such is true of the home, how much more so of the bedroom?"); *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) ("We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity"); *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) ("[W]hile society may not approve of the sexual practices of homosexuals, . . . that is not to say that society is unwilling to recognize that all adults . . . at least have a reasonable expectation that their sexual activities will remain

[43] *See Bowers*, 478 U.S. at 193-194 (as of 1986, 26 states had no sodomy law); *see also infra* note 51 (detailing changes since *Bowers*). Furthermore, only 13 states retain criminal laws against fornication. Posner and Silbaugh, *supra* note 20, at 98-110; Ga. Code § 16-6-18 struck down by Georgia Supreme Court in *In re J.M.*, No. SO2A1432 (Ga. Jan. 13, 2003); N.M. Stat. § 30-10-2 repealed by Laws 2001, ch. 32 § 1. The remaining laws likely still exist because few people have had a reason to lobby for the repeal of laws that are commonly understood not to be enforced, while many lawmakers have doubtless feared that a vote to repeal the laws would be viewed as approval of immoral conduct. Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. Fam. L. 45 (1991-92); Elizabeth Kolbert, *No Cheating Zone: Old Fashioned Ban on Adultery Is Back In Style in Connecticut*, Austin American-Statesman, Sept. 27, 1990, at A1 ("[L]egislators said it wasn't worth the effort [to repeal the state law against adultery] since the law was never enforced.").

personal and private."); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. 1996) ("[A]n adult's right to engage in consensual and noncommercial sexual activities in the privacy of [the] home . . . is at the heart of Tennessee's protection of the right to privacy."); *Commonwealth v. Wasson*, 842 S.W.2d 487, 494-95 (Ky. 1992) ("[I]t is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.").

To recognize that sodomy laws have not been used to prosecute consensual sex in private is not to deny that America has a long, sorry history of discrimination against those who love members of the same sex. Gay people have been denied jobs as everything from telephone operators to librarians to budget analysts to teachers to police officers to mail room clerks.[44] Gay people have lost their homes (as have heterosexuals who lived with gay people), and been told not to dance with each other, not to eat together in booths, not to go to bars or clubs together.[45] Gay people have had their families torn apart and their children left in

[44] *See, e.g., DeSantis v. Pacific Tel.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mut. Ins.*, 569 F.2d 325 (5th Cir. 1978); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1977); *Burton v. Cascade Sch. Dist. Union High Sch.*, 512 F.2d 850 (9th Cir. 1975); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Glover v. Williamsburg Local Sch. Dist.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd*, 669 F.2d 732 (5th Cir. 1982).

[45] *See, e.g., One Eleven Wines and Liquors Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12 (N.J. 1967); *Rolon v. Kulwitzky*, 200 Cal. Rptr. 217 (Ct. App. 2d Dist. 1984); *Morell v. Dep't of Alcoholic Beverage Control*, 22 Cal. Rptr. 405 (Ct. App.1st Dist. 1962); *420 E.80th v. Chin*, 445 N.Y.S.2d 42 (N.Y. App. Term. 1st Dep't 1982), *aff'd*, 468 N.Y.S.2d 9 (N.Y. App. Div. 1st Dep't 1983); *Hubert v. Williams*, 184 Cal. Rptr. 161 (App. Dep't, Super. Ct., L.A. County 1982).

peril.[46] They have been subjected to unspeakable violence for being gay.[47]

What lesbians and gay men have *not* been subject to is punishment for violation of criminal laws against private, consensual sodomy. That is, until recently. For starting in the late 1960s, as the social condemnation of being gay began to weaken, some states recast their sodomy laws, either explicitly or in practice, as laws aimed at gay people.[48] They then invoked those laws collaterally as justification for taking various discriminatory actions against gay people, from disrupting or destroying relationships between gay people and their children, to denying gay people employment, to discrediting them in public discourse.[49]

This new and selective targeting of lesbians and gay men, which highlights the equal protection problems described by Petitioners, underscores the larger reality that sodomy laws have long gone unenforced against private consensual sexual intimacy. This recent consciously

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[46] *See, e.g., Weigand v. Houghton*, 730 So. 2d 581, 588 (Miss. 1999) (McRae, J., dissenting) (placing child in home with convicted felon and wife abuser because father was gay); *S.A.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. App. 1987) (denying mother custody in favor of alcoholic father because mother was a lesbian).

[47] *See, e.g., Naboszny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir.1997); *Coon v. Joseph*, 237 Cal. Rptr. 873 (Ct. App. 1st Dist. 1987).

[48] Some states responded to the repeal of their general sodomy laws with enactment of sodomy laws applied only to same-sex activity. Eskridge, *Historiography*, *supra* note 13, at 660, 664-65. Kansas was the first, in 1969, *see* 1969 Kan. Sess. Laws 457; Kan. Stat. Ann. § 21-3505(a)(1) (1970), followed in the 1970s by Arkansas, Kentucky, Missouri, Montana, Nevada, Tennessee, and Texas. Eskridge, *Historiography*, *supra* note 13, at 664.

[49] *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

selective use of sodomy laws furnishes no basis to narrow the scope of the traditional American right of all adults to be free of government interference in the bedroom. Instead, it echoes Connecticut's sudden decision in the 1960s to enforce its ban on contraceptives, despite its failure to do so for close to a century prior,[50] a decision that did not constrict the right to private sexual intimacy ultimately recognized in *Griswold*.

Our nation's history and tradition thus show not what the *Bowers* majority seems to have assumed, but instead a long-standing, virtually universal refusal to apply sodomy laws to private, consensual conduct by adults—a deliberate policy that reflects a deeply rooted, widely shared, and increasingly voiced conviction that government has no business dictating to consenting adults what sexual intimacies they may have in private. As this Court said in a different context, "[t]he undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. . . . 'Deeply embedded traditional ways of carrying out state policy * * *'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.'" *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (Harlan, J., dissenting) (quoting *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940)).

Americans have a fundamental—and cherished—right to be intimate in their homes and to be "let alone" in that intimacy. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

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[50] *See Poe v. Ullman*, 367 U.S. 497, 501, 502, 512, 530 (1961) (law banning use of contraceptives had been on the books since 1879 and had been re-enacted twice since 1940, but the Court noted that the law had not actually been enforced for decades, despite the widespread use and sale of contraceptives in the state).

B. Texas's View Of Morality Does Not Justify This Denial Of Liberty

All Texas offers to justify its profound intrusion into the private sexual lives of Texans is the state's own, "because-we-say-it's-wrong" view of morality. Texas cannot find the required "compelling interest" that would justify invasion of a fundamental liberty by mere conclusory resort to the "controversial realm of morals." *Poe v. Ullman*, 367 U.S. at 545 (Harlan, J., dissenting); *cf. Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) (disagreeing that "society's moral views" could suffice to satisfy even intermediate *O'Brien* scrutiny). Many people questioned, and still question, the morality of abortion, interracial marriage, and the use of contraceptives within or outside of marriage. Indeed, state laws prohibiting all those practices were unquestionably based, at least in part, on the state's moral view of the matter. *See, e.g., Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy."); *Loving v. Virginia*, 388 U.S. 1, 7-12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). Yet no state's asserted interest in morality sufficed to justify overriding the fundamental liberties that those criminal statutes compromised. The same must be true here.

C. *Bowers v. Hardwick* Can And Should Be Overruled

The simple fact that *Bowers* was wrongly decided provides a powerful reason for overruling it. Adherence to a previous ruling is unwarranted when it "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

Because *Bowers*, which was a "solitary departure" from the rest of the Court's privacy jurisprudence, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (citation omitted), stands as "a positive detriment to coherence and consistency" in privacy law, *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), and was based on a "'less than accurate' historical analysis," *United States v. Dixon*, 509 U.S. 688, 711 (1993) (quoting *Solorio v. United States*, 483 U.S. 435, 442 (1987)), this Court should overrule that decision. To do so would not be to "depart from the fabric of the law; [it would be to] restore it." *Adarand*, 515 U.S. at 234.

After all, *stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 283 U.S. 393, (1932) (Brandeis, J., dissenting), nor is it "rigidly required in constitutional cases," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The Court has greater freedom to overrule prior cases where, as here, the scope of the Due Process Clause is at issue, *Burnet*, 283 U.S. at 410, and the case involves no "property" or "contract rights where reliance interests" are at their peak, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citations omitted).

In addition, significant changes have occurred since the *Bowers* decision. *See Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 2249 (2002). The trend of repealing or invalidating sodomy laws has continued; what started in 1961 with the repeal of the Illinois sodomy law has now spread to 37 states. Half the states that still had sodomy laws at the time *Bowers* was decided, including Georgia itself, now have no such law.[51] And only four states now have

[51] Repeal or invalidation of same-sex-only sodomy laws since *Bowers*: 1993 Nev. Stat. 236 (repealing Nev. Rev. Stat. § 201.193); *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont.

laws like the one in Texas, which is focused solely on same-sex couples.[52] As in *Atkins*, the "consistency of the direction of change" is itself instructive. *Atkins*, 122 S. Ct. at 2249.

These changes in state law also demonstrate that the principle announced in *Bowers*—that government may freely intrude into the nation's bedrooms to police the details of consensual adult sexuality—has not become imbedded in our "national culture." *Cf. Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (declining to overrule *Miranda v. Arizona*, which *had* become so imbedded). Quite to the contrary, the unidirectional vector of repeal and invalidation of state sodomy laws shows the degree to which a cultural consensus has emerged that government does not belong in the bedroom. *See Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring, joined by O'Connor, J., and Kennedy, J.) (noting that prior precedent is more vulnerable where it "conflicts with a public sense of justice").

1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996), *appeal denied* (Tenn. June 10, 1996 and Sept. 9, 1996).

Repeal or invalidation of general sodomy laws since *Bowers*: 2001 Ariz. Legis. Serv. 382 (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10-14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Williams v. Glendening*, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998); *Michigan Org. for Hum. Rights v. Kelley*, No. 88-815820CZ (Mich. Cir. Ct. Wayne County July 9, 1990); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. 4th Dist. May 15, 2001). In Maryland, Michigan, and Minnesota, trial court decisions striking down the laws became final when the states did not appeal.

[52] Kan. Stat. Ann. § 21-3505(a)(1); Mo. Rev. Stat. § 566.090 (*but see State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App., W. Div. 1999) (interpreting statute to apply only to non-consensual activity); Okla. Stat. tit. 21, § 886 (generally applicable statute construed by *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) not to cover heterosexual consensual behavior); Texas Penal Code § 21.06.

Bowers has also been undermined by the Court's intervening recognition in *Romer v. Evans*, 517 U.S. 620 (1996), that lesbians and gay men are entitled to equal protection under the law, regardless of the moral views a majority in any state may hold about them. *See also id.* at 641 (Scalia, J., dissenting). The *Bowers* decision has also led to "confusion," *United States v. Dixon*, 509 U.S. 688, 711 (1993), because lower courts, relying on the language in *Bowers* that there is no "fundamental right to engage in *homosexual* sodomy," *Bowers*, 478 U.S. at 191 (emphasis added), have disagreed, despite the Court's equal protection holding in *Romer*, about the legitimacy of singling out gay people for legal disadvantage when they engage in conduct for which heterosexuals are punished less severely or not at all.[53]

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[53] *Compare Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997) ("It is inconceivable that *Bowers* stands for the proposition that the State may discriminate against individuals on the basis of their sexual orientation solely out of animus."); *and Gryczan v. State*, 942 P.2d 112, 127 (Mont. 1997) (Turnage, C.J., concurring) (concluding same-sex-only sodomy law violated federal equal protection principles); *with Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (holding Attorney General could revoke offer of employment based on future staff attorney's same-sex wedding ceremony because "*Romer* is about people's condition; this case is about a person's conduct" and "in deciding *Romer*, the Court did not overrule or disapprove (or even mention) *Bowers* . . . , which was similarly about conduct"); *and State v. Limon*, No. 85,898, slip op. at 6 (Kan. Ct. App. Feb. 1, 2002) (upholding greater penalties for same-sex as opposed to different-sex sodomy based on *Bowers*), *rev. denied* No. 00-85898-A (Kan. June 13, 2002), *petition for cert. filed sub nom. Limon v. Kansas*, 71 U.S.L.W. 3319 (Oct. 10, 2002) (No. 02-583).

CONCLUSION

Amici respectfully submit that the Court should overrule *Bowers v. Hardwick* and declare that the liberty protected by the Due Process Clause encompasses consensual sexual intimacy between adults in private.

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No. 02-102

IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF TEXAS FOURTEENTH DISTRICT

BRIEF OF THE ALLIANCE OF BAPTISTS, THE AMERICAN FRIENDS SERVICE COMMITTEE, THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM, THE MOST REV. FRANK T. GRISWOLD, III, PRESIDING BISHOP OF THE EPISCOPAL CHURCH, THE METHODIST FEDERATION FOR SOCIAL ACTION, MORE LIGHT PRESBYTERIANS, THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, THE UNITARIAN UNIVERSALIST ASSOCIATION, AND 21 OTHER RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-102

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,
v.
STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS FOURTEENTH DISTRICT

BRIEF OF THE ALLIANCE OF BAPTISTS, THE AMERICAN FRIENDS SERVICE COMMITTEE, THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM, THE MOST REV. FRANK T. GRISWOLD, III, PRESIDING BISHOP OF THE EPISCOPAL CHURCH, THE METHODIST FEDERATION FOR SOCIAL ACTION, MORE LIGHT PRESBYTERIANS, THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, THE UNITARIAN UNIVERSALIST ASSOCIATION, AND 21 OTHER RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are religious bodies, religious leaders, and religiously-affiliated organizations representing faith traditions throughout the United States.[1] The *amici*

[1] Pursuant to Supreme Court Rule 37.3(a), the *amici* have obtained from all parties their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

hold differing views as to the morality of sexual conduct between consenting adults of the same sex. They are unanimous, however, in opposing laws that criminalize such conduct. The individual *amici* are described in the appendix to this brief.

SUMMARY OF ARGUMENT

The Texas law at issue in this case criminalizes private, consensual sexual conduct between adults, but only in cases involving same-sex partners. The State seeks to justify this criminal law as a means of enforcing morality, and the Texas court invoked the moral views of religious bodies in support of the law. In fact, many religious bodies in the United States oppose laws that criminalize private same-sex sexual conduct between consenting adults. Some of these religious bodies believe that homosexual conduct is not consistent with their religious and moral teachings, but nevertheless believe that laws subjecting such conduct to criminal sanctions are neither morally required nor morally justified. Other religious bodies believe that same-sex relationships between consenting adults are consistent with the moral teachings of their religion. In addition, many religious bodies oppose all forms of discrimination that stigmatize gay and lesbian members of society and deprive them of their dignity as human beings. In the light of these facts, the moral views of religious bodies in the United States do not provide a valid basis for upholding the criminal law at issue in this case.

ARGUMENT

The Texas Court of Appeals, in rejecting Petitioners' constitutional challenge to the Texas Homosexual Conduct Law, asserted that "homosexual conduct has historically been repudiated by many religious faiths," and that "[o]ur

society's three major religions – Judaism, Christianity, and Islam – historically have viewed homosexuality as immoral."[2] In making these assertions, the Texas court failed to recognize that many religious bodies and leaders in the United States are on record as opposing laws that criminalize private sexual conduct between consenting adults of the same sex. Some religious groups have determined that sexual relationships between same-sex couples are compatible with the requirements of morality and religion. Other religious groups do not approve of homosexual relationships, but nevertheless oppose criminalization of private sexual conduct between consenting adults. Furthermore, many religious groups and leaders oppose discrimination against gay and lesbian individuals.

I. MANY RELIGIOUS BODIES OPPOSE LAWS THAT CRIMINALIZE PRIVATE SEXUAL CONDUCT BETWEEN CONSENTING ADULTS OF THE SAME SEX

The *amici* hold differing views concerning the religious and moral propriety of sexual intimacy between same-sex partners, but they are unanimous in their belief that private, consensual sexual conduct between same-sex adults should not be punished as a crime. Governments are responsible for protecting and promoting the public good, and therefore the criminal law properly reaches all acts that involve rape, coercion, corruption of minors, or public indecency, whether engaged in by people of the same or different sexes. Beyond these legitimate concerns, however, governments should not attempt to legislate codes of private morality. Instead, private morality is a matter for individuals, families, and faith communities. In the words of one court, "[s]piritual leadership, not the government, has the

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[2] Pet. App. 28a & n.34 (internal quotation and citation omitted).

responsibility for striving to improve the morality of individuals."[3]

A. Many Religious Bodies Strongly Oppose Criminalizing Private Sexual Conduct Between Consenting Adults Of The Same Sex Even Though They Do Not Regard Such Conduct As Moral

Numerous religious bodies in the United States have expressly condemned laws that criminalize same-sex sexual intimacy. Many religious bodies have taken this position even though they counsel against homosexuality as a religious matter.

For example, the Lutheran Church in America proclaimed three decades ago that "the sexual behavior of freely consenting adults in private is not an appropriate subject for legislation or police action."[4] The Lutheran Church in America espoused this view even though it viewed homosexuality "as a departure from the heterosexual structure of God's creation."[5] The Church recognized that gay men and lesbians "are often the special and undeserving victims of prejudice and discrimination in law, law enforcement, cultural mores, and congregational life," and stated that it was "essential to see such persons as entitled to understanding and justice in church and community."[6]

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[3] *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996) (quoting *Commonwealth v. Bonadio*, 415 A.2d 47, 49-50 (Pa. 1980)).

[4] Lutheran Church in America, *Sex, Marriage, and Family* (1970), *reprinted in* THE CHURCHES SPEAK ON: HOMOSEXUALITY 113 (J. Gordon Melton ed., 1991).

[5] *Id.*

[6] *Id.* In 1988, the Lutheran Church in America, the American Lutheran Church, and the Association of Evangelical Lutheran Churches merged to form the Evangelical Lutheran Church in America. The Evangelical (...continued)

The Presbyterian Church (U.S.A.), with some 2.5 million members, similarly opposed criminalizing same-sex sexual acts more than 30 years ago. The Presbyterian Church stated that laws criminalizing "acts privately committed by consenting adults are morally unsupportable, contribute nothing to the public welfare, and inhibit rather than permit changes in behavior by homosexual persons."[7] In taking this position, the Presbyterian Church recognized that the "negative attitudes of church and society toward the phenomenon of homosexuality [have] often resulted in aggravated suffering and grievous injustice for homosexual persons."[8]

In 1978, the Presbyterian Church affirmed its belief that "homosexuality is not God's wish for humanity,"[9] but at the same time, affirmed its opposition to legislation proscribing same-sex sexual acts:

> Society does have a legitimate role in regulating some sexual conduct, for criminal law properly functions to preserve public order and decency and to protect citizens from public offense, personal injury, and

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Lutheran Church in America, with about five million members, has called "for legislation, referendums, and policies to protect the civil rights of all persons, regardless of their sexual orientation, and to prohibit discrimination in housing, employment, and public services and accommodations." Evangelical Lutheran Church in America, *Church Council Action CC.93.3.37* (1993), *available at* http://www.elca.org/dcs/elca_actions/ cc93_3_37.html.

[7] Presbyterian Church, *Sexuality and the Human Community* (1970), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 148.

[8] *Id.* at 147.

[9] Presbyterian Church, *Statement on the Ordination of Homosexuals: Policy Statement and Recommendations* (1978) (emphasis added), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 151.

> exploitation. Thus, criminal law properly prohibits homosexual and heterosexual acts that involve rape, coercion, corruption of minors, mercenary exploitation, or public display. However, homosexual and heterosexual acts in private between consenting adults involve none of these legitimate interests of society. *Sexual conduct in private between consenting adults is a matter of private morality to be instructed by religious precept or ethical example and persuasion, rather than by legal coercion.*[10]

The Presbyterian Church committed itself to "work for the decriminalization of private homosexual acts between consenting adults."[11] The Church subsequently reiterated its opposition to sodomy laws, and urged enactment of "laws forbidding discrimination based on sexual orientation in employment, housing, and public accommodations."[12]

Other religious bodies added their voices to those of Lutherans and Presbyterians. In 1974, the National Federation of Roman Catholic Priests' Councils ("National Federation") declared its opposition "to all civil laws which make consensual homosexual acts between adults a crime" and "urg[ed] their repeal."[13] The National Federation also

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[10] *Id.* at 155.

[11] *Id.* at 157-58.

[12] Presbyterian Church, *Minutes of the 199th General Assembly*, at 776 (1987), *available at* http://www.pcusa.org/101/101-homosexual.htm.

[13] National Federation of Roman Catholic Priests' Councils House of Delegates Meeting, *Resolution on Civil Rights of Homosexual Persons* (1974).

expressed its opposition to "discrimination against homosexuals."[14]

The Christian Church (Disciples of Christ), with approximately 800,000 members, called for the repeal of sodomy laws in 1977, noting that "these so called 'sodomy laws' are not restricted to homosexuals, yet are often enforced only upon the homosexual community, and unfair or uneven application of the law against homosexuals cannot be tolerated in a society which proclaims and honors the equal rights of all persons."[15]

The Reformed Church in America, with about 950 congregations in the United States, has declared that "[a]pproval of the homosexual orientation or acts is not a prerequisite to firm support of basic civil rights for homosexual persons."[16] Although the Reformed Church considers homosexuality to be "contrary to the will of God for human sexuality,"[17] it rejects sodomy laws and unequivocally affirms its belief that "the denial of human and civil rights to homosexuals is inconsistent with the biblical witness and Reformed theology."[18]

In taking this stand, the Reformed Church addressed two asserted justifications for sodomy laws – sexual crime and the influence of gay people upon children. The Reformed Church concluded that homosexual persons are no

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[14] *Id.*

[15] General Assembly of the Disciples, *Resolution 7747* (1977), *available at* http://www.synodassembly.net/disciples/129.htm.

[16] The Reformed Church in America, *Homosexuality: A Biblical and Theological Appraisal* (1978), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 172.

[17] *Id.* at 168.

[18] *Id.* at 172.

more likely to commit sexual crimes than heterosexual persons, and that laws properly criminalizing sexual acts against minors, public decency, rape, and prostitution are already in place and are equally applicable to heterosexual and homosexual persons.[19] The Reformed Church also noted that the sincere and legitimate concern of parents about the possible negative effects of homosexual role models is better addressed in faith organizations and at home: "Concern for youth is better expressed in these positive ways than through blanket, discriminatory sanctions against all persons of one sexual type."[20] The Reformed Church has concluded that "legislation specifically directed toward homosexual persons is unnecessary and constitutes a prejudicial attempt to legislate private morality."[21]

In sum, many religious bodies that view homosexual conduct as inconsistent with religious and moral precepts nonetheless believe that imposing criminal punishment for such conduct is neither morally necessary nor morally justified.

[19] *Id.*

[20] *Id.*

[21] *Id.*

B. Other Religious Bodies Accept Private Sexual Conduct Between Consenting Adults Of The Same Sex As Consistent With The Requirements Of Morality And Religion

Opposition to sodomy laws that target gay and lesbian people also is strong among religious organizations that do not condemn homosexuality on religious or moral grounds.

For example, the General Synod of the United Church of Christ ("UCC")[22] has declared its opposition to so-called "sodomy laws" and supported, regardless of sexual orientation, "the right to privacy, free from government intrusion, for all adults in their private consensual, sexual relationships."[23] The General Synod of the UCC also has condemned the exclusion of homosexuals from military service, called "for the passage of a federal gay and lesbian civil rights law that will end discrimination in employment, housing, public accommodations, and federally assisted opportunities,"[24] and allowed gay and lesbian church members to serve on committees that approve ministerial candidates for ordination.[25] More recently, the General

[22] The General Synod of the UCC is the representative body of the UCC. The UCC currently has nearly 1.4 million members.

[23] General Synod of the UCC, *Resolution on the Right to Privacy* (July 1987); *see also* General Synod of the UCC, *Resolution on Virginia Privacy Laws* (July 1991) (calling for the "repeal of all state sodomy laws which attempt to criminalize [private, consensual, non-commercial sexual activity between adults] and deny basic civil and human rights").

[24] General Synod of the UCC, *Resolution for Greater Leadership to End Discrimination Against Gays and Lesbians* (July 1993).

[25] General Synod of the UCC, *Resolution Recommending Inclusiveness on Association Church and Ministry Committees with the UCC* (1983), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 211-12.

Synod of the UCC has established an "Open and Affirming" movement, which encourages its individual congregations to "counter the widespread perception that . . . being gay, lesbian, or bisexual is wrong/sinful," and to spread the message that "sexuality is a good gift of our Creator, as is its responsible, loving expression."[26]

The Unitarian Universalist Association ("UUA"), comprising some 160,000 individuals, has called upon "all people" to bring an end to sodomy laws and discrimination on the basis of sexual orientation, declaring that "private consensual behavior between persons over the age of consent shall be the business only of those persons and not subject to legal regulations."[27] The UUA has long supported gay and lesbian people, and has created an Office of Bisexual, Gay, Lesbian, and Transgender Concerns, which fosters acceptance, understanding, and equality for gay and lesbian people in the UUA and in society at large.[28]

Similarly, the Union of American Hebrew Congregations ("UAHC"), which represents about 1.5 million congregants, stated in 1977 that "we affirm our belief that private sexual acts between consenting adults are not the proper province of government and law enforcement agencies."[29] The UAHC has continued to support gay and

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[26] General Synod of the UCC, *FAQ: The Open and Affirming Movement in the United Church of Christ*, *available at* http://www.ucc.org/justice/lgbt/ona.htm.

[27] General Assembly of the Unitarian Universalist Association, *Resolution on Discrimination Against Homosexuals and Bisexuals* (1970), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 266.

[28] UUA Congregational Handbook, *Developing a Diverse Congregation* (1995), *available at* http://www.uua.org/cde/handbook/conghand-16b.htm.

[29] UAHC, *Human Rights of Homosexuals* (1977), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 258.

lesbian people by reaffirming its commitment to welcoming gay and lesbian Jews into its congregations, encouraging their participation in all aspects of synagogue and communal life, and by supporting and affirming their personal relationships.[30]

The American Friends Service Committee ("AFSC") (Quakers) has called "on Friends and members of the AFSC organization to speak out against any attack on the civil and human rights of persons because of their sexuality or gender identity . . . . We particularly deplore any attack on the civil rights of gay, lesbian, bisexual and transgender persons couched in religious terms or attributed to scriptures. These acts are contrary to our own experience of God."[31]

It is clear from these examples that the morality invoked by Texas in support of its Homosexual Conduct Law is not shared by many religious bodies in the United States. Despite this diversity of religious opinion, the Texas court invoked the moral and religious views of certain faiths, in contravention of the principle that "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice."[32]

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[30] *See* UAHC, *Civil Marriage for Gay and Lesbian Jewish Couples* (1997), *available at* http://rj.org/uahc/dallas/ areso/civilmar.html.

[31] AFSC Board of Directors, *A Concern about Sexual and Gender Identity* (November 1999), *available at* http://www.afsc.org/news/1999/stbdlgbt.htm; *see also* AFSC, *Support of Lesbian, Gay, Bisexual, and Transgender (LGBT) People* (2001) (detailing chronology of AFSC's support for gay and lesbian people since the 1960s), *available at* http://www.afsc.org/hist/lgbt.htm.

[32] *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

II. NUMEROUS RELIGIOUS BODIES SUPPORT THE CIVIL RIGHTS OF GAY MEN AND LESBIANS

The Homosexual Conduct Law stigmatizes gay and lesbian individuals by criminalizing their sexual conduct while permitting identical conduct by different-sex adults. Many religious bodies that have not specifically addressed sodomy laws targeted at same-sex couples have recognized with concern that the laws of civil society often have stigmatized and marginalized gay men and lesbians. In response to such unequal treatment, numerous religious bodies have pronounced their support for the civil rights of gay men and lesbians.

For example, the Central Conference of American Rabbis, which includes about 1,800 rabbis serving more than 1.5 million Reform Jews, recently stated that "Our pursuit of *mishpat* [justice] should inspire us to eradicate prejudice, inequality and discrimination based upon gender or sexual orientation."[33]

The United Methodist Church, with more than 8 million members, stated in the early 1970s that it does not condone homosexuality and considers it to be incompatible with Christian teaching.[34] At the same time, the United Methodists proclaimed that "all persons" – including homosexuals – "are entitled to have their human and civil

[33] Central Conference of American Rabbis, *Ad Hoc Committee on Human Sexuality* (June 1998), *available at* http://ccarnet.org/hs.html. The Central Conference of American Rabbis further declared that "[a]ll Jews are religiously equal regardless of sexual orientation" and welcomed "all rabbis regardless of sexual orientation." *See Ari Goldman, Reform Judaism Votes to Accept Active Homosexuals in Rabbinate*, N.Y. TIMES, June 26, 1990, at A1.

[34] United Methodist Church, *Social Principles* (1972), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 241.

rights ensured."[35] More than a decade later, the United Methodists again "insist[ed] that all persons, regardless of . . . sexual orientation are entitled to have their human and civil rights ensured."[36] In 2000, the United Methodists affirmed their belief in the human rights and civil liberties of gay men and lesbians, and stated that "[w]e are committed to supporting those rights and liberties for homosexual persons."[37]

In 1976, the General Convention of the Episcopal Church (the Church's highest policy making body), representing more than 2 million members, expressed "its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and call[ed] upon our society to see that such protection is provided in actuality."[38]

The Church of the Brethren believes that "heterosexuality is the intention of God for creation," but it exhorts its members to "challeng[e] openly the widespread fear, hatred, and harassment of homosexual persons," and

[35] *Id.*

[36] United Methodist Church, *Social Principles* (1988), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 242.

[37] UNITED METHODIST CHURCH, THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, at ¶66H (2000), *available at* http://www.umc-gbcs.org/gbpr092.htm.

[38] Episcopal Church, General Convention, *Statement on Homosexuality*, Resolution A-71 (1976), *available at* http://www.episcopalarchives.org/cgibin/acts_new/acts_resolution.pl?resolution=1976-A071. The Standing Commission on Human Affairs of the Episcopal Church has recommended that the church allow gay and lesbian clergy at the discretion of local bishops. *See* Peter Steinfels, *Lesbian Ordained Episcopal Priest*, N.Y. TIMES, June 6, 1991, at A1.

"advocat[e] the right of homosexuals to jobs, housing and legal justice."[39]

The Alliance of Baptists recognizes the "unjust treatment of same-sex oriented persons by the church and society," and encourages "individuals and churches to accept, in response to the biblical mandate for justice, the call to witness . . . the civil rights and equality of opportunity for persons of same-sex orientation, and to oppose the humiliation and violence done to them."[40]

Finally, the National Council of the Churches of Christ, an ecumenical organization of Christian faiths that comprises 36 Protestant, Anglican, and Orthodox member denominations with more than 50 million members, opposes discrimination based upon "affectional or sexual preference" and has declared that "as a child of God, every person is endowed with worth and dignity that human judgment cannot set aside. Therefore, every person is entitled to equal treatment under the law."[41] The National Council of the Churches of Christ urges churches and individual members "to work to ensure the enactment of legislation at the national, state and local levels that would guarantee the civil rights of all persons without regard to their affectional or sexual preferences."[42]

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[39] Church of the Brethren, *Human Sexuality from a Christian Perspective* (1983), *reprinted in* CHURCHES SPEAK, *supra* note 4, at 86-87.

[40] The Alliance of Baptists, *Report of the Task Force on Human Sexuality* (Mar. 2001), *available at* http://www.allianceofbaptists.org/Resources/sexuality%20brochure%202001.pdf.

[41] National Council of the Churches of Christ, *Resolution on Civil Rights Without Discrimination as to Affectional or Sexual Preference* (1975).

[42] *Id.* Likewise, although the Roman Catholic Church views sexual conduct between members of the same sex as sinful, it also maintains that "men and women who have deep-seated homosexual tendencies . . . do not choose their homosexual condition," and that "[e]very sign of unjust (...continued)

These examples demonstrate that Texas' asserted justification for targeting gay men and lesbians for unequal treatment is not shared by numerous mainstream religious organizations. To the contrary, many religious bodies strongly support equal protection under the law for gay men and lesbians. The Texas Homosexual Conduct Law criminalizes intimate acts between members of the same sex that would be legal if performed between a man and woman, and thus fails to accord equal treatment to gay and lesbian individuals.

CONCLUSION

The religious traditions of some *amici* recognize the morality of consensual sexual intimacy between members of the same sex or hold that such conduct is not intrinsically immoral. The religious traditions of other *amici* teach that same-sex sexual conduct is to be discouraged by the family and faith community. Despite these differences, the *amici* are unanimous in the belief that criminalizing the private behavior of a particular minority, as Texas' Homosexual Conduct law does, intrudes upon individual liberty and violates the rights of gay, lesbian, and bisexual individuals.

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discrimination in their regard should be avoided." CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2357-59 (1994), *available at* http://www.vatican.va/archive/catechism/p3s2c2a6.htm.

For the foregoing reasons, the *amici* urge the Court to reverse the judgment of the court below.

Respectfully submitted,

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January 16, 2003

APPENDIX

The Alliance of Baptists is an ecumenically oriented association of 120 congregations and individual members with an aggregate membership of more than 60,000 persons. Since 1995 the Alliance has recognized the "unjust treatment of same-sex oriented persons by the church and society" and encouraged "individuals and churches to accept, in response to the biblical mandate for justice, the call to [work for] civil rights and equality of opportunity for persons of same-sex orientation, and to oppose the humiliation and violence done to them." Although Baptist polity does not permit any Baptist to speak for another or any association of Baptist churches to speak definitively for any individual congregation, the position of the Alliance with respect to sexual orientation is well established.

American Friends Service Committee. In June 1976, the Board of Directors of the American Friends Service Committee, founded by the Religious Society of Friends (Quakers), issued a public statement affirming the AFSC's support of the human and civil rights of homosexual and bisexual persons. To further this concern, the AFSC included lesbians, bisexuals, and gay men as protected groups in its affirmative action plan and created programs to serve them. In October 1999, recognizing that many persons were claiming that Christianity condemns homosexual relationships, the Board stated: "[w]e particularly deplore any attack on the civil rights of gay, lesbian, bisexual and transgender persons couched in religious terms or attributed to scriptures. The Board believe[s] that human sexual diversity is a gift from God to be celebrated. AFSC believes that exploring our spirituality demands an exploration of our sexuality unconstrained by bigotry and hate."

The American Jewish Committee was founded in 1906 to combat bigotry, protect the civil and religious rights of Jews here and abroad, and advance the cause of improved

human relations for all people everywhere. We believe that the spirit of liberty, enshrined in the Constitution, necessarily encompasses the concept of privacy for all citizens. This means that it should not be the business of government to intrude on or punish any private sexual conduct between consenting adults, and we urge state legislatures to respect this fundamental right. The American Jewish Committee will continue its strong support for legislation to bar discrimination based on sexual orientation in jobs, housing, education and public accommodations.

The Commission on Social Action of Reform Judaism ("CSA") is a joint instrumentality of the Union of American Hebrew Congregations ("UAHC") and the Central Conference of American Rabbis ("CCAR"). The 900 congregations of the UAHC encompass 1.5 million Reform Jews, and the membership of the CCAR includes 1,800 Reform rabbis. The CSA implements policy positions adopted by the UAHC and CCAR.

As Jews, we are taught, in the very beginning of the Torah, that God created humans *b'tselem elohim*, in the Divine Image, and that we are all, therefore, deserving of equal treatment (Genesis 1:27). Judaism consistently teaches the importance of tolerance and the acceptance of others, even those different from ourselves. The UAHC and the CCAR are committed to the belief that all citizens are entitled to equal protection under the law and, therefore, oppose discrimination against homosexuals in any form, including discriminatory governmental statutes and practices of law enforcement agencies.

The Most Rev. Frank T. Griswold, III, Presiding Bishop of The Episcopal Church. The Episcopal Church is a hierarchical Christian denomination and a province of the worldwide Anglican Communion; it is geographically divided into more than 110 dioceses in the United States and several nations abroad. Each such diocese is headed by a

bishop and contains a number of worshipping congregations, each generally with its own ordained priest

The chief pastor and executive of The Episcopal Church is its Presiding Bishop, who is elected from among the bishops of the dioceses by the Church's General Convention. The current Presiding Bishop, one of the *amici curiae* in this case, is the Most Reverend Frank T. Griswold, III. The Presiding Bishop, among his other pastoral and administrative duties, often speaks for the Church on matters on which the Church has formally taken a policy position or as to which it is appropriate for the Presiding Bishop to take a leadership role.

The Episcopal Church has long adhered to its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and has articulated this position in a series of resolutions adopted by its General Convention, which are cited in this Brief.

The Methodist Federation for Social Action, founded in 1907, is an independent, nation-wide network of United Methodists supporting and augmenting peace and justice ministries of the United Methodist Church. Our members are organized into 38 chapters throughout the country. Members work on a wide variety of peace and justice issues including religious liberty, promotion of human rights, non-discrimination, and the empowerment of women. We fully support, and work to promote, the stance of the United Methodist Church through is Social Principles where it states that all persons, regardless of sexual orientation, are entitled to have their human and civil rights protected and that "homosexual persons no less than heterosexual persons are individuals of sacred worth."

More Light Presbyterians are individual members and congregations of the Presbyterian Church (USA) who are faithful to God's call and believe that God continues to open new understandings of scripture and the Word in the life of

Christ. As a Christian community, we believe that the church must seek to live out those understandings in our life together. Since the 1978 General Assembly, our church has urged us to study sexuality, to take the initiative to know and to listen to gays and lesbians, to respect their civil rights, and to see them as brothers and sisters in Christ. We bear witness to the individual God-given gifts of gay, lesbian, bisexual, and transgender people in the Presbyterian Church. Following the risen Christ, and seeking to make the Church a true community of hospitality, the mission of More Light Presbyterians is to work for the full participation of lesbian, gay, bisexual, and transgender people of faith in the life, ministry and witness of the Presbyterian Church (USA).

The General Synod of the United Church of Christ is the most representative body of the denomination of the United Church of Christ, a national Christian fellowship with nearly 1.4 million members and 6,000 congregations. The General Synod has consistently adopted social policy statements that urge all of its constituents to end discrimination against persons based on their sexual orientation. In 1993, the General Synod of the United Church of Christ passed a resolution that specifically calls for "an end to state 'sodomy laws.'"

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of equality for all people, separation of church and state, personal religious freedom and the right to privacy. Most relevant to the case at bar are the Association's resolutions (a) opposing the criminalization of same-sex sexual conduct, (b) opposing all other forms of discrimination based on sexual orientation and practice and

(c) affirming the goal of equality, dignity and respect for all people, regardless of affectional or sexual orientation.

Affirmation: Gay and Lesbian Mormons is a fellowship of gays, lesbians, bisexuals, their family and friends who share the common bond of the Mormon experience. Its purpose is to provide a supportive environment for relieving the needless fear, guilt, self-oppression, and isolation that Latter-day Saints gays and lesbians can experience in an era where ignorance about human sexuality is too often a reality. We believe that a same-gender orientation and same-gender relationships can be consistent with and supported by the Gospel of Jesus Christ.

Affirmation: United Methodists for Lesbian, Gay, Bisexual & Transgendered Concerns consists of lesbians, gay men, bisexuals, transgendered persons, and their friends, families and supporters who affirm full participation of all persons and who relentlessly pursue policies and processes to that end. Specifically, together we proclaim a Gospel of respect, love and justice. We seek to overcome the barriers that diminish our common humanity by excluding or judging people because of their sexual orientation or identity, race, gender, class or physical abilities. We empower people to undertake works of inclusion and justice where they are. Affirmation provides theological foundation and socio-cultural insights leading the church to respond to God's call to be fully inclusive. When necessary, we lovingly challenge and confront the policies and practices that reflect institutionalized homophobia and heterosexism.

The Al-Fatiha Foundation is an international organization dedicated to Muslims who are lesbian, gay, bisexual and transgendered, those questioning their sexual orientation or gender identity, and their friends. Al-Fatiha's goal is to provide a safe space and a forum for Muslims of diverse sexual orientations to address issues of common

concern, share individual experiences and institutional resources, and support individuals in reconciling their sexual orientation or gender identity with Islam. Al-Fatiha promotes the Islamic notions of social justice, peace, and tolerance through its work, to bring all closer to a world that is free from injustice, prejudice, and discrimination. We seek to foster spirituality among lesbian, gay, bisexual and transgender Muslims, and to encourage dialogue with the larger Muslim community around issues of sexuality and gender.

The Association of Welcoming & Affirming Baptists consists of member churches, organizations, and individuals who are willing to go on record as welcoming and affirming all persons without regard to sexual orientation, and who have joined together to advocate for the full inclusion of lesbian, gay, bisexual and transgender persons within Baptist communities of faith. We proclaim in many ways that people of diverse sexual orientations are in the pulpits and pews of Baptist churches. Initiated by a group of American Baptist pastors in 1991 at the American Baptist Biennial Meeting, the Association of Welcoming & Affirming Baptists was formally organized at the 1993 Biennial. It now consists of 42 congregations, several local church groups and pastoral counseling centers, an international ministry, and individuals throughout the American Baptist Church USA.

Axios USA, Inc. is an organization of gay and lesbian lay Christians. We work for the knowledge and understanding of men and women of homosexual orientation among the public and within the institutions of various Eastern Orthodox, Oriental Orthodox (Non-Chalcedonian), and Eastern-Rite Catholic Churches by means of educational and charitable activities. Our members engage in research and dialogue with church authorities and members of the gay and lesbian community.

Brethren/Mennonite Council for Lesbian, Gay, Bisexual and Transgender Interests provides support for Mennonite and Church of the Brethren gay, lesbian, transgender, and bisexual people, their friends and families. We foster dialogue between gay and non-gay people in churches and provide accurate information about human sexuality from the social sciences, biblical studies, and theology. We support all people as they seek to know God's will for their lives, including those open to same-sex relationships, those seeking a life of celibacy, and those exploring questions of sexual orientation. We also believe that God celebrates the love shared in same-sex relationships. We seek a prophetic voice by advocating issues of justice on behalf of all lesbian, gay, bisexual, and transgender people, being in dialogue with the larger denominational community, and by collaborating with lesbian, gay, bisexual, and transgender groups of other denominations.

Dignity USA is the largest national lay movement of lesbian, gay, bisexual, and transgender Catholics, our families, and our friends with chapters located throughout the United States. As GLBT Catholics, it is our right, our privilege, and our duty to live the sacramental life of the Church. Dignity/USA envisions and works for a time when lesbian, bisexual, gay, and transgender Catholics are affirmed and experience dignity through the integration of their spirituality with their sexuality and as beloved persons of God participating fully in all aspects of and within the Church and society. We believe that we can express our sexuality in a loving, life-affirming manner that is in keeping with Christ's teaching.

Disciples Justice Action Network (DJAN) is a national network of justice-seeking individuals, congregations and organizations within the Christian Church (Disciples of Christ). We seek to promote and live into the justice, peace, and inclusion that are recorded in the Scriptures, proclaimed in the Gospel, and manifested at the

Lord's Table. We therefore support the full civil and human rights of all people, including those among us who are lesbian, gay, bisexual, or transgender.

Equal Partners in Faith is a multi-racial national network of religious leaders and people of faith committed to equality and diversity. Our diverse faith traditions and shared religious values lead us to affirm and defend the equality of all people, regardless of religion, race, ability, gender, sexual orientation or gender identity. As people of faith, we actively oppose the manipulation of religion to promote inequality and exclusion.

Fellowship of Reconciling Pentecostals International is a network of Pentecostal ministers, churches and ministries which seeks by means of the full gospel of Jesus Christ to reconcile all repentant people to God without regard to race, gender, political persuasion, economic or educational status, sexual orientation, nationality, religious affiliation, or any other thing that divides. We provide wounded apostolics an affirming home among those of "like precious faith," and a safety net for those in personal, family, or religious crisis. We stand together in love, and for the glory of Jesus' Name, to promote apostolic truth, Pentecostal worship, righteousness, counseling, education, evangelism, ministerial accountability, and fellowship.

The Gay, Lesbian and Affirming Disciples Alliance, Inc. is an organization of gay, lesbian, bisexual, transgendered and affirming lay and clergy members of the Christian Church (Disciples of Christ) working for the full acceptance and inclusion of lesbian, gay, bisexual, and transgendered persons in the Christian Church (Disciples of Christ). Toward this end, we work as members of our congregations, regions, and general church and with the agencies and units of the Christian Church (Disciples of Christ).

Hadassah, the Women's Zionist Organization of America, was founded in 1912 and is the largest women's and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah strongly supports the constitutional guarantees of privacy and equal protection, and rejects unnecessary government intrusion into private matters of personal conscience and discrimination based on sexual orientation.

Integrity, Inc. is a nonprofit organization of lesbian, gay, bisexual, and transgender Episcopalians and our straight friends. We hold our mission to be the witness of the lesbian and gay community in the Episcopal Church and of the Episcopal Church in the lesbian and gay community. Integrity has been the leading grassroots voice for the full inclusion of GLBT persons in the Episcopal Church and our equal access to its rites. At the national level and in local chapters and diocesan networks throughout the country, the primary activities are worship, fellowship, education, communication, outreach, and service to the church. Through Integrity's evangelism, thousands of GLBT people, estranged from the Episcopal Church and other denominations, have returned to parish life.

The Interfaith Alliance is the nation's largest non-partisan, clergy-led grassroots organization dedicated to promoting the positive and healing role of religion in the life of the nation and challenging those who manipulate religion to promote intolerance. With more than 160,000 members drawn from over 65 faith traditions, 38 local Alliances, and a national network of religious leaders, The Interfaith Alliance promotes compassion, civility and mutual respect for human dignity in our increasingly pluralistic society. Since its formation The Interfaith Alliance, based on the core values of

numerous religious traditions, has worked to promote tolerance and fight all forms of discrimination in our society. Working at the state and national level, The Interfaith Alliance has supported civil rights laws to ensure the full protection of the law for gay, lesbian and bisexual individuals. From its national office to its local alliances, The Interfaith Alliance is an inclusive organization that does not discriminate based on race, gender, disability, religion, sexual orientation or legal status. The Interfaith Alliance believes that discrimination based on sexual orientation not only hurts the individuals directly affected but also harms society as a whole. The Interfaith Alliance's mission is to promote the healing role of religion in public life. When religion is used to justify the persecution of individuals based on their sexual orientation it is completely antithetical to the mission of The Interfaith Alliance.

Lutherans Concerned/North America, an independent membership organization including members of all Lutheran affiliations as well as other Christian denominations, stands as a community of faith, modeling the gospel with the church and within the gay, lesbian, bisexual, and transgendered communities. The Division of Outreach of the Evangelical Lutheran Church in America formally established a continuing relationship with Lutherans Concerned/NA in 2002. We seek to employ the Gospel's principles of inclusiveness and justice, celebrating God's gifts of sexuality and diversity. We envision ourselves as a community that is empowered through baptism, centers its life in worship, acts decisively for justice, seeks the guidance of the Holy Spirit to integrate and express our spiritual and sexual selves, and calls the entire church to be a visible proponent of justice for all gay, lesbian, bisexual, and transgendered people. As Christians, we believe we are empowered to be a model of the Gospel, loving our fellow human beings and promoting justice for all.

Northaven United Methodist Church in Dallas, Texas is a church that engages in reconciling ministries as a part of the Reconciling Ministries Network. Our official mission statement reads, in part, "Because we believe that God's love in Jesus Christ has broken down the walls that divide us, we seek to embody that love in our congregation and welcomes persons of all races, sexual orientations, and economic circumstances."

Our congregation is approximately 40 percent gay and lesbian, and they comprise a large number of key leadership positions at all levels of the church -- from key administrative committee chairs, to Sunday School teachers. We have found that traditional heterosexual families, single parent families, gay and lesbian families, and many others, are attracted to our church; where we seek to create a welcoming space here all can use the gifts God gave us, to do something good for the world.

Reconciling Ministries Network is a growing movement of United Methodist individuals, congregations, campus ministries, and other groups working for the full participation of all people, including people of all sexual orientations and gender identities, in the life of the United Methodist, both in policy and practice. Though independent from the United Methodist Church, we are a part of the Methodist tradition of social concern and action, a justice-seeking, Spirited people. The Reconciling Ministries Network encompasses 176 Reconciling Congregations, 25 Reconciling Campus Ministries, and numerous other "reconciling" groups. There are more than 17,000 Reconciling Methodists.

Seventh-day Adventist Kinship International, Inc. is a lay support organization of over one thousand individuals in twenty countries devoted to the spiritual, emotional, social and physical well-being of current and former Seventh-day Adventists who are lesbian, gay, bisexual or transgendered.

We believe that we are all created in the image of God and that no one should be mistreated or discriminated against because of their sexual orientation differences. We are a volunteer organization that champions human rights for all people.

The Universal Fellowship of Metropolitan Community Churches (UFMCC) is an international Christian religious denomination, which includes more then 200 churches in the USA with 40,000 members and adherents. The UFMCC has a primary ministry and constituency in gay, lesbian, bisexual and transgendered communities. From its inception in 1968, the UFMCC has worked vigorously through both legislative and legal means for the repeal or removal of state sodomy laws throughout the USA. At its 1985 General Conference in Miami, Florida, member churches of the UFMCC passed a resolution recognizing that "members of many of our churches suffer the loss or threat of their freedom, civil rights and human dignity because of these sodomy laws," and urging "the active participation of its members including contributions of time and money, in organized efforts to help repeal sodomy laws in those states which still have them."

The World Congress of Gay, Lesbian, Bisexual, and Transgender Jews: Keshet Ga'avah was officially born in 1980. We are an umbrella organization of more than sixty-five member organizations extending across North America, Latin America, Eastern and Western Europe, South Africa, Australia, and Israel. Our vision is an environment where lesbian, gay, bisexual, and transgender Jews worldwide can enjoy free and fulfilling lives.

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AMICI CURIAE BRIEF OF THE LOG CABIN REPUBLICANS AND LIBERTY EDUCATION FORUM IN SUPPORT OF THE PETITIONERS

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No. 02-102

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AMICI CURIAE BRIEF OF THE LOG CABIN REPUBLICANS AND LIBERTY EDUCATION FORUM IN SUPPORT OF THE PETITIONERS

The Log Cabin Republicans and Liberty Education Forum respectfully submit this brief *amici curiae* in support of the petitioners in this case.[1]

1. Letters from petitioners and respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

The Log Cabin Republicans is a nonprofit corporation organized in 1978 under the laws of the District of Columbia. The largest organization associated with the Republican Party that is dedicated to interests of the gay and lesbian community, the Log Cabin Republicans has over fifty chapters across the United States, including several chapters in the State of Texas. It stands for, among other things, limited government, individual liberty, individual responsibility, free markets, and a strong national defense, as well as the belief that the moral values underlying these principles are consistent with the equal protection of laws for gay and lesbian Americans. Throughout its history, the Log Cabin Republicans and its members have supported political candidates, community activities and educational initiatives that provide equal rights under the law to all Americans, promote nondiscrimination against or harassment of persons who are gay or lesbian, and encourage participation in the Republican Party by gay and lesbian Americans. The membership of Log Cabin Republicans includes both heterosexual and homosexual Republicans.

The Liberty Education Forum was established as an educational research foundation dedicated to advancing the conservative principles of individual liberty, individual responsibilities, free markets and limited government. Since 1996, the Liberty Education Forum has advanced these conservative principles by sponsoring a variety of education publications and programs that endeavor to protect the individual freedoms of gay and lesbian Americans.

SUMMARY OF ARGUMENT

The State of Texas extended its criminal law into the homes of its citizens in an unjustified intrusion into the sphere of protected privacy that the Constitution of the United States creates for certain intimacies expressed in American family life. *Amici* join the Petitioners before this Court to argue that the fundamental privacy rights ensconced in the Bill of Rights and incorporated in the Fourteenth Amendment entitle all Texans under the Due Process Clause of the Fourteenth Amendment to demand that the Texas Legislature provide substantial justification for its intrusion into the intimate lives of some Texans. We believe that it cannot.

Allowing this Texas law to stand would jeopardize longstanding constitutional traditions that have placed the highest value upon both the protection of the American family and the sanctity of the home against governmental intrusion. The mere invocation by the State of Texas of the term "morality" cannot defend a law that so implicates its citizens' most intimate affairs in the most private of realms.

This Court confronted similar issues in *Bowers v. Hardwick*. *See* 478 U.S. 186 (1986). We acknowledge that the text of the United States Constitution has not been altered since that time. Significant social and cultural developments since *Bowers*, though, have resulted in a clearer understanding that members of *all* American families have a fundamental right to enjoy intimate association without fear of government intrusion, and that the variety of American family life that must be protected under that rubric includes gay and lesbian couples. Thus, whatever might have been the presumed propriety of *Bowers* in 1986, it is clear now that its holding must be overturned.

The Texas law challenged here and others like it have survived under the protection of the *Bowers* precedent, which denied to gays and lesbians the heightened-scrutiny protections for their intimate associations, which have been recognized to protect the private, intimate associations of other American families. That precedent must be abjured, and such laws must be subjected to heightened scrutiny, which will require states to offer a far more powerful justification than the one offered here: that the State of Texas has criminalized gay and lesbian relationships simply because a majority of Texas legislators once disapproved of them. Such legislation is "inconsistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by everyone within the United States." *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).

Amici also join the Petitioners' argument that the Texas Homosexual Conduct Law violates the Equal Protection Clause of the Fourteenth Amendment because it bears no rational relationship to a legitimate state interest. The Court should hold that mere "morality" cannot justify state-sponsored discrimination against gay and lesbian Americans. *See Romer v. Evans*, 517 U.S. 620 (1996). (*Amici* do not repeat Petitioners' argument in this brief.)

ARGUMENT

The State of Texas has criminalized homosexual conduct in Section 21.06 of the Texas Penal Code ("Homosexual Conduct Law" or "Section 21.06"). Texas threatens to punish such conduct with imprisonment even if engaged in by consenting adults in a committed relationship, behind closed doors in their own home. At issue in this case is whether the

fundamental right to privacy traditionally afforded in American family life really does protect its most intimate of associations.

The Texas Court of Appeal – Fourteenth District found that "homosexual conduct" was not a right "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Lawrence v. State of Texas*, 41 S.W.3d 349, 361 (Tex. App. – Houston [14th District] 2002). The court also concluded that the state's prohibition of homosexual conduct is rationally related to a legitimate state interest, the preservation of public morality. *Id.* at 356.

This Court, in *Bowers*, made some assertions that could provide sanction for the Fourteenth District's conclusions. There the Court refused to recognize that the fundamental rights that the Constitution generally afforded to the American family included protection of certain expressions of intimacy that various states group under the label "sodomy." Perhaps capturing the sentiment of at least some Americans in 1986, Chief Justice Burger characterized instances of that expression undertaken by members of the same sex, though both private and consensual, as "an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature, and 'a crime not fit to be named.'" *Bowers*, 106 U.S. at 197.

Whatever the validity of such calumnies as an expression of the public morality of 1986, they represent today only ethical arcana. The increased social visibility of gays and lesbians since *Bowers* has resulted in a deeper and broader understanding of American family life, one that includes families comprised of gays and lesbians. Indeed, gay and lesbian couples hold "covenant ceremonies" in many of our

Nation's churches and synagogues and celebrate those ceremonies with the community in our newspapers.

These dramatic social and cultural developments have been matched by significant change in demographics, commerce and law since *Bowers*. Today, the public presence of gay and lesbian families in American life is undeniable. A significant number of American businesses recognize an American family that includes gays and lesbians by providing to such families the same employment benefits that are afforded to married heterosexual couples. The laws of many of our state and local governments have moreover matured to support an institution of family comprised of gays and lesbians, including laws that protect gays and lesbians from discrimination and that allow them to adopt children.

Thus, despite Chief Justice Burger's explication of American morality in 1986, it is clear in 2003 that gay and lesbian couples are no longer the targets of disdain and scorn that he described. The Court can no longer deny that the privacy protections generally afforded the American family must necessarily protect too *their* rights to intimate association without eviscerating the privacy protections for all other American families. All of this demands that the Court re-examine its holding in *Bowers* and strike down laws such as the Texas law at issue as an unjustified state intrusion into the private lives of American citizens, an assault on the concept of ordered liberty and a violation of the U.S. Constitution.

I. The Court Should Reconsider *Bowers v. Hardwick* and Recognize that Fundamental and Constitutionally Protected Right to Privacy Protects the Intimate Relationships for *All* American Families from Unjustified State Intrusion.

The foundational commitment of the United States of America was to ensure to "all Men" the "unalienable Rights" of "Life, Liberty, and the Pursuit of Happiness." Our Framers acknowledged this commitment by constructing a Constitution designed to prevent the majoritarian abuse of power and afford each American a sphere of protected conduct that could not be invaded by any combination of interests. THE FEDERALIST NO. 10 (James Madison). Those protections are included in the Due Process, Privileges or Immunities, and federal-government power-restricting Clauses of the Bill of Rights, as supplemented by the Fourteenth Amendment and construed by this Court. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Pierce v. Society of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510, 534-35 (1925); *Poe v. Ullman*, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1962); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Doe v. Bolton*, 410 U.S. 179, 200 (1973); *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Carey v. Population Servs. Int'l*, 431 U.S. 679, 684-85 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 501-03 (1977); *Cruzan v. Director, Missouri Dep't. of Health*, 497 U.S. 261, 278-79 (1990); *Planned Parenthood v. Casey*, 505 U.S. 833, 846-51 (1992); *Prince v. Massachusetts*, 321 U.S. 158 (1994); *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *see also Corfield v. Coryell*, 6 Fas. Cas. 546 (C.C.E.D. Pa. 1823) (no. 2320).

This Court has made clear that the right to private relationships within families is one of the inalienable rights ensconced in the Bill of Rights guaranteed to all Americans, and is applicable to the states through the Fourteenth Amendment. The Court has provided the highest level of constitutional protection under the Due Process Clause of the Fourteenth Amendment to American family life because family "is deeply rooted in this Nation's history and tradition" and contributes so powerfully to the happiness of individuals. *Moore*, 431 U.S. at 503 (plurality opinion); *see Prince*, 321 U.S. at 166 (1994). The "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ.*, 414 U.S. at 639-40. This protection arises because the Constitution prevents government "from standardizing its [citizens] by forcing all to live in certain narrowly defined family patterns." *Id.* at 506 (plurality opinion).

The Court has afforded these constitutional protections within a broad context of American family life. In *Griswold*, the court defined the family as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold*, 381 U.S. at 486. The Court in *Moore* in fact warned of "cutting off any protection of family rights at the first convenient, if arbitrary boundary the boundary of the nuclear family."[2] *Moore*, 431 U.S. at 502 (plurality opinion).

This Court's recognition that the family is not a cause, not a polity, not a project has been supplemented by an explanation of what a family is: at its heart, it is an *intimate* association.

2. Notwithstanding its *Bowers* holding, the Court traditionally has rejected a narrow analysis of fundamental rights afforded to the family. *See, e.g., Moore*, 431 U.S. at 504-05.

The Court has thus consistently recognized that a right to familial association must include a right to intimate association. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). The State of Texas, for one, also recognized the importance of intimate association for some when it amended the Texas Penal Code to legalize sodomy for heterosexual couples.[3]

The Texas Homosexual Conduct Law and others like it in Oklahoma, Missouri, and Kansas stand for the principle that the fundamental right to intimate associations in family life is afforded only to those who adhere to an ideal of family once held by the Texas Legislature.[4] The Texas law, by its terms, applies only to same-sex couples. Broader sodomy laws that apply (at least facially) to all Americans remain on the books in nine other American states.[5] While these broader laws do not

3. The legislature only singled out "'the private homosexual acts of consenting adults'" for continued criminalization out of "'fear [] [of] a backlash against the entire Penal Code [revision] should such acts be decriminalized.'" *Baker v. Wade*, 553 F. Supp. 1121, 1151 (N.D. Tex. 1982) (quoting Von Beigel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 HUMAN RIGHTS 23 (1977)), *aff'd on other grounds*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *rehearing en banc denied*, 774 F.2d 1285 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

4. *See* OKLA. STAT. tit. 21, § 866 (as applied to exclude heterosexual conduct, *see Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986)); MO. REV. STAT. § 566.090; KAN. STAT. ANN. § 21-3505(a)(1).

5. ALA. CODE §§ 13A-6-60(2), 13A-6-65(a)(3); FLA. STAT. ANN. § 800.02; IDAHO CODE § 18-6605; LA. REV. STAT. ANN. § 14:89; MISS. CODE ANN. § 97-29-59; N.C. GEN. STAT. § 14-177; S.C. CODE ANN. § 16-15-120; UTAH CODE ANN. § 76-5-403(1); Va. CODE ANN. § 18.2-361(A).

facially discriminate against gays or lesbians, they too are unconstitutional. All of these laws constitute an unconstitutional attempt to enforce its view of family life by propelling the criminal law deep into the American home without even claiming to vindicate the state interests of protecting public decency, protecting vulnerable persons, or restricting coercive commercial trade in activities offensive to public morality.

In response to any constitutional concern, the State of Texas merely suggests that gay and lesbian Texans should avail themselves of the legislative process to win their fundamental rights. Patty Reinert, *Supreme Court Takes Houston Sodomy Case*, HOUS. CHRON., Dec. 3, 2002 at 1. But the fundamental right of privacy reserved to all citizens by the United States Constitution enjoys protection from the vagaries of the political process; it is thus no answer to tell those deprived of their privacy rights to protect them in the political arena.

Were Texas a political subdivision of the United Kingdom, which recognizes a parliamentary government where the legislative will is supreme, its position might be correct, but American states must attend to the radically different form of government that the United States has developed: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections. . . ." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Amici thus believe that this case presents to the Court an important opportunity for it to clarify that the privacy protections the Court has explicated for the expression of

intimate relationships in American family life, and to strike down laws that violate that privacy protection for some Americans without even pretending to vindicate an articulated state interest.

Should the Court fail to overrule *Bowers* and allow the State of Texas to so intrude upon the most intimate of relationships of its citizens in the most private of realms,

> then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material. Virtually all the intimacies, privacies and autonomies of life would be regulable by the legislature – not necessarily by the legislature of this year or last year, but, it might be, by the legislature of a hundred years ago, or even by an administrative board in due form thereunto authorized by a recent or long-dead legislature.

Charles Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32 (1970).

A. Protection of a Broadly Defined Family Is Implicit in the Concept of Ordered Liberty for All Americans.

The Court has long recognized certain rights to be fundamental to the concept of ordered liberty for all Americans because "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept

largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). Among those rights implicit in the ordered concept of liberty, the Court has consistently acknowledged a "private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166; *see also Roe* at 152-153; *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1973); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsburg v. New York*, 390 U.S. 629, 639 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

Affirming such values of American liberty long before the Court's progeny of *Griswold*, Justice Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

The Court has not limited these constitutional protections only to Americans who are married. Since *Griswold*, this Court has recognized that all Americans, regardless of status,

possess the same liberty interest to make their own intimate choices in "matters so fundamentally affecting a person." *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972); *see also Casey*, 505 U.S. at 898; *Carey*, 431 U.S. at 685. Neither do those activities and relationships lose their intimate status when engaged in for reasons other than procreation. In fact, the Court has reasoned that certain fundamental rights arise not just because they touch upon childbearing, but because they arise solely in the context of a "field that by definition concerns the most intimate of human activities and relationships." *Carey*, 431 U.S. at 685.

The protections of American family life have not been limited by an immutable constitutional view of the American family. *See, e.g., Troxel*, 530 U.S. at 63 ("The demographic changes of the past century make it difficult to speak of an average American family. [It] varies greatly from household to household"); *id.* at 85 (Stevens, J., dissenting); *id.* at 98-101 (Kennedy, J., dissenting); *Michael H. v. Gerald D.*, 491 U.S. 110, 133 (1989) (concurring opinion of O'Conner and Stevens, J.J.) (Recognizing "enduring 'family' relationships may develop in unconventional settings"); *Stanley*, 405 at 651 (Even "family relationships unlegitimized by a marriage ceremony").

In short, this Court has long recognized that the U.S. Constitution protects a broadly defined concept of American family life and the intimate relationships implied by the existence of those families – not as a function of reproduction, but as a function of the inherent right of each individual to form the intimate connections of his or her own choosing.

B. Intimate Relationships Occupy a "Private Realm of Family Life the State Cannot Enter."

Consistent with the ideals of liberty and the pursuit of happiness, the Court has consistently recognized that paramount to the security of liberty protected by the Bill of Rights are "choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the state because [of] the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts*, 468 U.S. at 617-618. "[T]he constitutional shelter . . . reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecti[on] . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619; *see also Quiltoin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Cleveland*, 414 U.S. at 639-40; *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545. The Court has further held that personal affiliations entitled to such protection were those exemplified in family relationships. *Roberts*, 468 U.S. at 619.

Paramount to the protection of choosing and maintaining intimate human relationships is sexual intimacy, which constitutes "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I*, 413 U.S. at 63; *see Bowers*, 106 U.S. at 205 (dissenting opinion) (quoting *Roberts*, 468 U.S. at 619) (the "ability independently to define one's identity that is central to any concept of 'liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment of close ties with others'"). Sexual intimacy is in fact necessary to form

and nurture intimate relationships central to families of all Americans, regardless of sexual orientation.[6]

This Court, even when some find a certain type of American family unpopular or immoral, has kept a citizen's right to choose with whom one forms intimate relationships elevated from government's reach. *See, e.g., Loving*, 388 U.S. at 12. Justice Jackson explained for this Court,

> we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [Freedom] to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

West Va. Bd. of Educ., 319 U.S. at 641-42.

The U.S. Constitution therefore reserves to all Americans the inalienable right to choose those with whom they make their most intimate of associations and maintain that relationship free from unjustified state intrusion.[7]

6. *See, e.g.*, L. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples*, SEXUALITY IN CLOSE RELATIONSHIPS 177-91 (K. McKinney & S. Sprecher eds. 1991).

7. This Court has, of course, recognized the right of private organizations to develop their own rules of associational exclusion in contexts much less intimate, much less central to human happiness, and thus much less constitutionally protected than the associations at issue in this case. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (Cont'd)

So important is this right that the Court has found that the First Amendment broadly protects *all* "those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." *Rotary Int'l*, 481 U.S. at 545.

It is therefore deeply rooted in our Nation's rich tradition that all Americans are entitled to be free from the reach of a criminal law predicated solely on the state's desire to dictate the consensual, private, physical, and emotional interactions undertaken between citizens in the privacy of their homes. For if the Due Process Clause of the Fourteenth Amendment has any meaning, it must protect a "private realm of family life which the state cannot enter." *Moore*, 431 U.S. at 499 (plurality opinion) (quoting *Prince*, 321 U.S. at 166).

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(2000). Because that case presented a situation in which the private organization wished to *exclude* gays from association, a decision upholding laws like Section 21.06 would directly suggest that gay and lesbian Americans lack *for their most intimate associations* fundamental protections that can be employed by heterosexual Americans in *casual* association to exclude gays and lesbians. So far from rendering sexual orientation a protected category, then, the Court would declare that gays and lesbians are, and may be treated as, a pariah class against whom – but never for whom – the rights of private association may function.

C. Social and Cultural Developments Since 1986, and a Decent Regard for the Rights of All Americans, Require that this Court Revisit its *Bowers* Holding.

Despite the recognition of previous fundamental rights afforded in American family life, particularly the right to form intimate associations, the Court in *Bowers* refused to recognize such rights extended to gay and lesbian Americans. Rather, the Court found that "[n]o connection between family, marriage or procreation on the one hand and homosexual activity on the other hand has been demonstrated, either by the Court of Appeals or by respondent." *Bowers*, 106 U.S. at 191.

As the quote above indicates, *Bowers* embraces the notion that gay and lesbian relationships and their intimate associations do not deserve the fundamental privacy protections provided to heterosexual relationships and their intimate associations. *Bowers* was wrong when written, as a signatory of the majority opinion subsequently acknowledged. *See* John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, 302-05 (Charles Scribner's Sons, 1994). In the seventeen years since that decision, however, American culture and mores have developed in a manner that belies that conclusion and renders it inappropriate to the world of the twenty-first century.

The Court must therefore reconsider its prior denial of the fundamental constitutional right to privacy to an entire class of Americans – gays and lesbians – in light of the revolution in American cultural development in the last twenty years. This Court has an obligation *now* to give full meaning to an essential aspect of liberty, thereby correcting the failure of an earlier generation and a gross injustice to a

class of American citizens. *See, e.g., Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Roe*, 410 U.S. at 861-63; *Loving*, 388 U.S. at 12; *Meyer*, 262 U.S. at 402; *Casey*, 505 U.S. at 847-48. Indeed, the very foundation upon which *Bowers* was built has been shown to be false. *See Casey*, 505 U.S. at 862-63.

Since *Bowers*, our Nation has come to acknowledge and respect that American family life includes gay and lesbian relationships.[8] The 2000 United States Census in fact counted at least 600,000 households of unmarried same-sex partners, living in 99.3% of American counties.[9] Gay and lesbian relationships are regarded as enduring, providing long-term and deep sustenance to each member of the couple. *See, e.g.*, Bryant & Demian, *Relationship Characteristics of American Gay and Lesbian Couples*, 1 J. GAY & LESBIAN SOC. SERVS. 101 (1994).

Gay and lesbian couples moreover celebrate commitments to their relationships in our Nation's churches and synagogues.[10] Furthermore, in the long-standing

8. Gaiutra Bahadur and Andy Alford, *A New Haven for Gay Couples: The Suburbs Census Shows Lesbians Lead Exodus from Cities to Newly Accepting Areas*, AUS. AMER. STATESMEN, Aug. 22, 2001 at A1; Anna Quindlen, *The Right to Be Ordinary: Weddings, Scouting, Surviving – Gay Men and Lesbians Are More Than What They Do in Bed*, NEWSWEEK, Sept. 11, 2000 at 82.

9. Kelley Davenport, *Family is Love: There are 600,000 Same-Sex Couples Heading Households in the United States, According to Latest Census*, STATE J.-REG. (SPRINGFIELD ILL.), Sept. 20, 2002 at 6A. This figure is likely understated because of current U.S. Census Bureau methodology.

10. *See, e.g.*, Laurie Goodstein, *Church Allows Same-Sex Ceremonies: Presbyterian Ministers May Now Conduct "Holy* (Cont'd)

American tradition of celebrating such events with the community, they now celebrate their unions in our Nation's newspapers.[11] In its announcement to publish such events, the New York Times wrote, "[i]n making this change, we acknowledge the newsworthiness of a growing and visible trend in society toward public celebrations of commitment by gay and lesbian couples – celebrations important to many of our readers, their families and friends." *Times Will Begin Reporting Gay Couples' Ceremonies*, N.Y. TIMES, Aug. 18, 2002 at A30. Gay and lesbian relationships cannot therefore be dismissed "as a mere collection of unrelated individuals." *Smith*, 431 U.S. at 844; *cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

Since *Bowers*, both commerce and law have changed dramatically to recognize family relationships formed by gay and lesbian Americans. Leading businesses have recognized the importance of gay and lesbian families by providing domestic partnerships employment benefits equal to those of heterosexual married couples. *See, e.g.*, Thomas A. Stewart, *Gay in Corporate America*, FORTUNE, Dec. 16, 1991 at 42; Jeremy Quittner, *Paths to Success; Companies With the Best Sexual Orientation Rules*, *The Advocate*, Oct. 23,

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Union" Services for Gay Couples, ORANGE COUNTY (CAL) REG., May 25, 2000 at A5; Carlyle Murphy and Bill Broadway, *D.C. Church Authorizes Same-Sex Unions*, WASH. POST, Dec. 10, 2001 at B1; Dennis M. Mahoney, *Church to Allow Same-Sex Ceremonies*, COLUMBUS DISPATCH (OHIO), Nov. 18, 2000 at 1A.

11. In an undeniable trend, over 180 newspapers in United States communities now publish announcement of gays and lesbians "unions." *See, e.g.*, Monty Phan, *Newspapers Announce Gay Unions*, THE MIAMI HERALD, Aug. 21, 2002 at C3.

2001 at 28. Today, nine states, the District of Columbia, and 129 municipalities offer government-sponsored domestic-partner benefits. In recognition of the sheer number of family relationships formed by gays and lesbians, the American Law Institute has devoted an entire chapter to domestic partnership in its most recent work on family law. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (A.L.I. 2002).

Like other American families, many gay and lesbian couples adopt and raise children even though they cannot together procreate. *See, e.g.*, Sean Jensen, *Former Viking Esora Tuaolo Has Found Peace Since He Said He Was Gay*, ST. PAUL PIONEER PRESS (MINN.), Nov. 17, 2002 at 1C (Mr. Tuaolo and his partner are the adoptive parents of twins); Harriet Barovick, *Rainbow Network: As Gay Families Increase, So Do Support Services Designed Just For Them*, TIME, April 15, 2002 at F10. In support of these families, the vast majority of every state permits gays and lesbians to adopt children individually, jointly and/or through second-parent adoptions.[12]

Recognizing that American family life includes gays and lesbians but acknowledging the lingering animus towards them, an ever-increasing number of states and municipalities, including at least four cities in Texas, have now added sexual orientation to laws barring discrimination in housing, employment, public accommodations, and other areas.[13]

12. *See, e.g., American Academy of Pediatrics, Co-Parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (Feb. 2002).

13. 1999 Cal. Stat. 592; CONN. GEN. STAT. § 46, 81(a) *et seq.*; D.C. CODE ANN. § 1-2541(c) (1981); 1991 Haw. Sess. Laws 2; 2001 (Cont'd)

Even the executive branch of the United States government respects that American family life includes homosexuals and that gays and lesbians are deserving of protection from discrimination, notwithstanding the families they choose to form.[14]

Indeed, this Court has itself acknowledged that "it appears that homosexuality has gained greater societal acceptance" since the days of *Bowers*. *Boy Scouts of Am.*, 520 U.S. at 660. As demonstrated by these undeniable, dramatic changes in American culture and mores, *Bowers* no longer represents an accurate statement of the national mind, much less the constitutional law.

As conservative organizations that recognize the importance of reliance upon precedent and strict construction, *amici* do not support "judicial activism" or decisions that create "constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers*, 478 U.S. at 194. Overturning *Bowers*, however, will not be an act of judicial activism, nor will it create rights out of whole

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Md. Laws ch. 340; 1989 Mass. Legis. Serv. 516 (West); 1993 Minn. Sess. Law Serv. ch. 22 (West); 1999 Nev. Stat. ch. 410; 1997 N.H. Laws ch. 108; 1991 N.J. Sess. Law ch. 519 (West); 2002 N.Y. Laws ch. 2; 1995 R.I. Pub. Laws ch. 95-32; 1992 Vt. Acts & Resolves 135; 1981 Wisc. Laws ch. 112; Austin, Tex., CODE, Vol. I, tit. VII (2001); Dallas, Tex. Municipal Ordinance No. 24927 (2002), amending Dallas, Tex. CODE ch. 15B; Fort Worth, Tex., CODE, ch. 17, art. III (2001); Houston, Tex., CODE ch. 2, tit. XIV (2002).

14. *See* Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969), as amend by Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (June 2, 1998) (adding "sexual orientation" to the non-job-related grounds upon which an employment decision cannot be based).

cloth.[15] *Bowers* itself worked the unwarranted judicial activism by excluding a class of people – gays and lesbians – from a set of long-established constitutional rights without the slightest textual support for its conclusions. The Constitution does not make gays and lesbians second-class citizens. It does not, of course, mention sexuality at all. Any attempt, like that of *Bowers*, then, to deprive gays and lesbians of certain rights provided to other Americans itself works judicial activism – the particularly ugly judicial activism of writing into the Constitution the notion that "We, the Majority of Justices, disapprove of gays and lesbians, and therefore exclude them from otherwise universal protections."

The fundamental right to privacy guaranteed all Americans must stand as a "necessary corollary of giving individuals freedom to choose how to conduct their lives" – and with whom – "is acceptance of the fact that different individuals will make different choices." *Bowers*, 478 U.S. at 205-06 (Blackmun, J., dissenting). *Bowers* denied erroneously a fundamental constitutional right of American citizens over and against the state for which no countervailing rights of other individuals were at stake. *See also West Va. Bd. of Educ.*, 319 U.S. 624, 630 (1943); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954). In his dissent to *Bowers*, Justice Blackmun wrote:

> The fact that individuals define themselves in a significant way through their intimate sexual

15. No matter the basis for the Court's *Bowers* holding, *Amici* do not "believe that . . . judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Rochin v. State of California*, 342 U.S. 165, 171-72 (1952).

> relationships with others suggests, in a nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom to choose the form and nature of these intensely personal bonds.

Id. at 205 (Blackmun, J., dissenting).

Indeed, "[u]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Moore*, 431 U.S. at 499.

D. The Texas Homosexual Conduct Law and Others Like It Constitute an Unjustified State Intrusion on Ordered Liberty; and If the Rights of All Americans to Undertake Intimate Expressive Conduct Is to Be Protected, All "Sodomy" Laws Must Be Struck Down.

Recognition of the fundamental right to privacy for Americans to express their most intimate of family associations does not end the constitutional inquiry as "[n]ot all governmental intrusion is of necessity unwarranted." *Casey*, 505 U.S. at 875 (opinion of O'Connor, Kennedy, and Souter, J.J.). The Court must also consider whether laws like the Texas Homosexual Conduct Law further a compelling state interest without imposing an undue burden on those affected. *Id.* at 878. *See also Thornburgh*, 476 U.S. at 828-29. Such considerations require that this Court not only invalidate the specific Texas statute before it, but that the Court strike down all laws that purport to illegalize "sodomy."

There exists no countervailing state interest for these laws comparable to those weighed by this Court in other recent cases involving fundamental liberties.[16] The lower court in fact recognized that the justification urged by Texas was a generalized and amorphous interest in "moral values," though the state has been unable or unwilling to delineate the specific public values at stake.[17] *Lawrence*, 41 S.W.3d at 354. Moreover, the means with which Texas and other states have chosen to advance their "interests" unduly burden the fundamental right of all Americans to life, liberty, and the pursuit of happiness for they use "the full power of the criminal law," *Poe*, 367 U.S. at 548 (Harlan, J., dissenting), to enforce their aesthetic whims.[18] These statutes must fall.

Neither are such laws that are facially neutral with regard to forbidding "sodomy" acceptable. Because these laws define sexual intimacy in such a way that makes criminal virtually any form of intimate expression available to same-sex couples, they condemn *de facto* gay and lesbian relationships. The Court would work the profoundest nullity to forbid Texas to regulate "sodomy" for gay and lesbian,

16. *See, e.g.*, *Casey*, 505 U.S. at 871-79 (opinion of O'Connor, Kennedy, and Souter, J.J.) (potential human life); *Troxel*, 530 U.S. at 73 (plurality opinion of O'Connor, J.) (welfare of children); *Cruzan*, 497 U.S. at 280-281 (existing human life).

17. *Amici* further believe that other debunked justifications for such laws (e.g., such as public health concerns) veil an animus or bias towards gays and lesbians and do not constitute a compelling interest to so burden the fundamental right of Americans to express their most intimate of family associations.

18. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L.L. REV. 103 (2000).

but not for heterosexual, couples but effectively allow other states to criminalize virtually all intimate expressive conduct of which gays and lesbians couples are capable.

Meanwhile, the Court, as noted above, has already extended the privacy protection to intimate heterosexual conduct that occurs out of wedlock and for purposes other than for procreation. No constitutional explanation can now exist, then, for this Court to differentiate among kinds of private, consensual, intimate expressions between couples, except procreation-regarding distinctions the Court has long since rejected or those based upon the biased, uniformed, and repudiated view of same-sex intimacy express by Chief Justice Burger in *Bowers*.

The thinly-veiled interests promulgated by these states, as exemplified by the State of Texas, and aimed at forcing a view of American family life on all citizens cannot support laws that represent a crack in the foundational commitment of the Untied States of America. The Texas Homosexual Conduct Law and all others like it infringe upon the most personal of liberties guaranteed to all Americans by the U.S. Constitution and should be struck down.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge that *Bowers* be overruled and the judgment of the Texas Court of Appeals – Fourteenth District be reversed.

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In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS

On Writ Of Certiorari
To The Court Of Appeals Of Texas,
Fourteenth District

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association (ABA) is the leading national membership organization of the legal profession. It has a membership of more than 400,000 attorneys throughout the United States, including attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2] The ABA's membership is composed of attorneys, including gay and lesbian attorneys, in all 50 States.

Over the past 30 years, the ABA has sought repeatedly to further the rule of law by advocating the elimination of laws that criminalize noncommercial, private sexual conduct between consenting adults, as well as laws and policies that discriminate against gay men and lesbians. In 1973, the ABA, through its House of Delegates,[3] adopted a policy urging States to repeal all laws criminalizing noncommercial sexual contact between consenting adults

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] The House of Delegates is the ABA's policy-making body, comprising over 500 delegates and representing various entities within the ABA, as well as the legal profession as a whole. Reports that recommend the adoption of specific policy positions are submitted by ABA sections, committees, affiliated organizations, state and local bar associations and individual ABA members. The full House votes on the recommendations and those that are passed by the House become the official policies of the ABA.

in private. *See* App., *infra*, 1a.[4] The ABA has since adopted a series of other policies that make clear its support for the equal treatment of all persons, regardless of sexual orientation, in employment, housing, public accommodations, education, and judicial proceedings. *See* App., *infra*, 3a (policy adopted August 1987 regarding bias-motivated crimes); App., *infra*, 3a-4a (policy adopted August 1989 regarding discrimination in employment, housing, and public accommodations); App., *infra*, 4a (Model Code of Judicial Conduct, Canon 3B(5), adopted August 1990); App., *infra*, 4a (policy adopted August 1991 regarding bias in federal judicial system); App., *infra*, 4a-5a (policy adopted February 1992 regarding discrimination on university campuses). Relying upon those policies, the ABA filed briefs as *amicus curiae* in *Romer v. Evans*, 517 U.S. 620 (1996), and in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The ABA also has adopted policies that support equal treatment by the government of family relationships involving gay men and lesbians, including those involving adoption, child custody and visitation rights, and crime victim compensation funds. *See* App., *infra*, 8a (policy adopted August 1995 regarding child custody and visitation); App., *infra*, 8a-9a (policy adopted February 1999 regarding adoption); App., *infra*, 9a (policy adopted August 2002 regarding same-sex domestic partners' eligibility for crime-victim compensation funds). In addition, in 1979, the ABA adopted a policy urging the United States to ratify the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, which commits State parties to respect the civil rights of all persons within their jurisdiction. *See* App., *infra*, 1a-3a. That treaty, ratified by the United States in 1992, includes provisions that the United Nations Human Rights Committee has construed to prohibit the criminalization of

[4] The ABA policies cited in this brief are reprinted below in the appendix. *See* App., *infra*, 1a-9a.

consensual adult sodomy and discrimination on the basis of sexual orientation. *See* note 15 *infra*.

The ABA has made special efforts to eliminate discrimination against gay men and lesbians who are, or wish to become, attorneys. In 1992, the ABA amended its constitution to make the National Lesbian and Gay Law Association an affiliated organization with a vote in the House of Delegates. *See* App., *infra*, 5a, codified at Constitution of the ABA, § 6.8(a). In 1994, the ABA incorporated into its Standards for Approval of Law Schools a requirement that accredited institutions not discriminate on the basis of sexual orientation in admissions. *See* App., *infra*, 5a-8a. In 1996, the ABA adopted a policy urging state and local bar associations to study bias against gay men and lesbians within the legal profession and the criminal justice system and to make recommendations to eliminate such bias. *See* App., *infra*, 8a. Most recently, in 2002, the ABA amended its constitution to specify that state or local bar associations may not be represented in the House of Delegates if they discriminate on the basis of sexual orientation. App., *infra*, 9a, codified at Constitution of the ABA, § 6.4(e).

Given the nature and extent of the concerns addressed in the ABA policies described above, the ABA has a strong interest in the proper resolution of the questions presented in this case to ensure the protection of liberty and equal justice under law.

SUMMARY OF ARGUMENT

The Texas Homosexual Conduct Law infringes individual liberty by authorizing the State, through its criminal law, to intrude upon intimate associations, to undermine bodily integrity, and to invade the privacy of the home. It also irrationally singles out a discrete group for second-class treatment. The statute thereby undermines the rule of law and should be declared unconstitutional.

A. Thirty years ago, *amicus curiae*, the American Bar Association (ABA), adopted a policy urging States to

repeal laws that criminalize private, noncommercial sexual contact between consenting adults. That 1973 ABA policy, like the similar recommendation of the American Law Institute's Model Penal Code, was rooted in concerns that criminal sodomy statutes undermined the rule of law because no legitimate government interest warranted criminalizing the conduct; enforcement required intrusive police investigations; many Americans engaged in the conduct in disregard of the criminal prohibition, thereby undermining the public's respect for the law; the laws were arbitrarily enforced and members of racial minorities tended to be the persons prosecuted; there was a serious question of the statutes' constitutionality; and, although the laws applied to both heterosexual and homosexual conduct, they were most often enforced against, and used to discriminate against, gay men and lesbians. Since 1973, the ABA has adopted a series of other policies that make clear its support for the equal treatment of all persons, regardless of sexual orientation.

All but 13 States now have repealed or judicially invalidated their criminal sodomy statutes. Contrary to the practices of an earlier era, state bars across the nation have determined that qualified gay men and lesbians should not be denied admission to the legal profession based on their sexual orientation. A majority of state courts, as well as many national law firms and law schools, have adopted policies prohibiting discrimination based on sexual orientation. The success of those policies demonstrates the irrationality of discrimination based on sexual orientation.

The Texas Homosexual Conduct Law and similar statutes, however, continue to stigmatize gay men and lesbians. The laws are used to justify discrimination against gay men and lesbians as second-class citizens not entitled to the same government protections as other members of society. Declaring Texas's Homosexual Conduct Law unconstitutional will remove that untenable justification for such conduct and will vindicate the rule of law.

B. The criminal convictions of petitioners under the Texas statute violate constitutionally protected liberty and privacy interests. Although the Court held in *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), that "homosexual sodomy" was not protected by the Due Process Clause, that holding is inconsistent with the weight of this Court's modern precedents regarding the Constitution's special protections for intimate association, bodily integrity, and the privacy of the home. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992), the Court reaffirmed two lines of precedent that, over more than a hundred years, have recognized that the substantive component of the Due Process Clause protects "liberty relating to intimate relationships" and "personal autonomy and bodily integrity." An adult's right to engage in private, noncommercial, consensual intimate conduct is protected under the rationale of those lines of cases as reiterated and refined in *Casey*. *Bowers* departed from those cases by describing the historical right at issue as "homosexual sodomy" and did not take into account the fact that, at the time the Fourteenth Amendment was ratified in 1868, nearly all of the States criminalized *all* sodomy. States' criminal statutes did not single out same-sex conduct until the mid-20th Century.

To deny same-sex couples protection from criminal prosecution for private noncommercial, consensual sexual conduct is also inconsistent with the Court's decisions that recognize the heightened protection accorded by the Constitution to conduct that takes place in the home. *See Kyllo v. United States*, 533 U.S. 27, 37 (2001). *Bowers* relied upon the conclusion that there had been no connection demonstrated between homosexual activity and the family. That connection has since been well documented through census figures that establish that more than one million people in this country live with a same-sex partner, and through studies that indicate, for example, that approximately 22% of partnered lesbians and 5% of partnered gay men are raising children in their homes – forming families that are nontraditional, but entitled to constitutional protection from state interference.

Finally, *Bowers* should be overruled because it is inconsistent with *Romer v. Evans*, 517 U.S. 620 (1996). *Romer*'s holding that the mere desire to make gay men and lesbians "unequal to everyone else" was not a legitimate government interest, *id.* at 635, is irreconcilable with *Bowers*' holding that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is sufficient to justify a criminal sodomy law, 478 U.S. at 196.

C. The Texas Homosexual Conduct Law also rests on a classification that is not rationally related to any legitimate government interest and thus violates the Equal Protection Clause. The disparate treatment of homosexual and heterosexual sodomy is a modern development that reflects the unwillingness of the majority to be subject to the same criminal strictures that are imposed on the minority, contrary to a fundamental tenet of the rule of law. There is no relationship between the State's asserted interest in encouraging marriage and biological reproduction, Br. in Opp. 18, and the classification at issue. The State's classification allows unmarried heterosexuals to engage in nonprocreative sexual conduct, but prohibits other unmarried persons (gay and lesbian couples) from engaging in the very same conduct. Tradition and history do not support the State's unequal treatment because sodomy laws singling out same-sex conduct are of only recent vintage. Ultimately, the State's only rationale for the Texas Homosexual Conduct Law is the "communal belief that the [homosexual] conduct is wrong and should be discouraged." Br. in Opp. 19. But that belief is not sufficient to justify a criminal sanction in light of the Court's holding in *Romer* that mere disapproval of homosexuality does not constitute a "legitimate government purpose" for "singling out a certain class of citizens for disfavored legal status or general hardships." 517 U.S. at 634, 633. Indeed, Texas's admitted practice of rarely enforcing the criminal statute undermines any claim that the statute actually furthers a legitimate state interest.

ARGUMENT

THE TEXAS HOMOSEXUAL CONDUCT LAW IS UNCONSTITUTIONAL AND CONTRARY TO THE RULE OF LAW BECAUSE IT INFRINGES INDIVIDUAL LIBERTY AND IRRATIONALLY SINGLES OUT A DISCRETE GROUP FOR SECOND-CLASS TREATMENT.

A. Laws That Criminalize Private, Noncommercial Sexual Conduct Between Consenting Adults Contravene The Rule Of Law.

The Texas Homosexual Conduct Law, Tex. Pen. Code § 21.06, and other statutes that criminalize private, noncommercial sexual behavior between consenting adults contravene the rule of law. Conceptually, the "rule of law" is a broad term that encompasses both procedural and substantive limitations on government power. At its core, it requires evenhanded and neutral enforcement of rules that respect the rights of individuals as autonomous beings to live their lives free from arbitrary governmental restraints. *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1 (1997). The American Bar Association (ABA) is committed to advancing the rule of law in the United States and throughout the world. *See* American Bar Ass'n, *Policy & Procedures Handbook* 2, Goal VIII (2002).

1. The ABA's policies urging the repeal of sodomy laws and prohibiting sexual orientation discrimination reflect a growing consensus that the rule of law does not tolerate intrusions into private, noncommercial sexual conduct between consenting adults or invidious distinctions based on sexual orientation.

In 1973, the ABA adopted a policy urging States "to repeal all laws which classify as criminal conduct any form

of noncommercial sexual contact between consenting adults in private, saving only those portions which protect minors or public decorum." App., *infra*, 1a. That policy represented the culmination of decades of study by States and the legal profession regarding the tension between protecting individual liberty and using the criminal law to regulate noncommercial sexual behavior between consenting adults in the privacy of their homes, particularly when such laws often were enforced arbitrarily to target gay men and lesbians.

Beginning after World War II, several state commissions studying criminal sexual offenses, including those in New Jersey, New York, Illinois, and California, published influential reports arguing that private, noncommercial consensual same-sex sexual conduct is not the proper concern of the law. *See* William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631, 661-662. One well-known report concluded that state laws should distinguish between conduct that merely may offend community morals (*e.g.*, homosexual conduct), and dangerous, aggressive conduct that is an actual threat to the community. *See* Paul Tappan, *The Habitual Sex Offender: Report and Recommendations of the [New Jersey] Commission on the Habitual Sex Offender* 17-18 (1950). Those reports were relied and expanded upon by the American Law Institute (ALI) in 1955 in the course of drafting its Model Penal Code. *See* Model Penal Code § 207.5(1) commentary at 277-278 (Tentative Draft No. 4, 1955).

The ALI, under the direction of Herbert Wechsler as Chief Reporter, determined that statutes criminalizing consensual adult sexual conduct undermine the rule of law in at least three ways. First, the ALI concluded that no legitimate government interest warrants criminalizing private conduct between consenting adults that does not harm other people, particularly in light of the intrusive police investigations that would be necessary if the statutes were to be enforced. *Id.* § 207.5 commentary at 277, 278, 279. As Judge Learned Hand explained during the debate on the question whether to recommend the decriminalization of consensual sodomy: "I think it is a

matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about." American Law Institute, *Transcript of Proceedings* 129 (May 19, 1955). Second, the ALI concluded that sodomy laws criminalize conduct in which many Americans (both heterosexual and homosexual) engage and that respect for the law is undermined by such widespread disregard for a criminal prohibition. *See* Model Penal Code §§ 207.1, 207.5 commentary at 206, 276 (Tentative Draft No. 4, 1955). Third, it concluded that sodomy laws were being enforced arbitrarily. The large majority of offenders escaped detection, and those who were criminally prosecuted and imprisoned tended to be drawn from racial minority groups. *Id.* at 205, 278.[5] Moreover, sodomy laws created a significant risk of blackmail. *Id.* at 278-279; *see also* National Inst. of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* 6 & n.5 (1972) (estimating more than ten percent of gay men subjected to blackmail).

The 1973 ABA policy stemmed from rule-of-law concerns similar to those that motivated the ALI. The ABA policy recommended the repeal of all laws that regulated noncommercial sexual contact between consenting adults in private. App., *infra*, 1a. The Report supporting adoption of the policy specifically relied upon the ALI's assessment of the high cost that the laws imposed on personal autonomy and the lack of any corresponding benefit to the State. *See* App., *infra*, 12a, 14a. The Report also pointed to decisions of this Court, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and stated that "there is a serious question of the constitutionality of such statutory prohibitions against

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[5] Historically, the enforcement of criminal sodomy laws often was tainted by racial considerations. *See* Eskridge, *supra*, at 649 (in 1880 more than half the people imprisoned for sodomy were people of color in the South); *cf. Hunter v. Underwood*, 471 U.S. 222, 226-227, 232 (1985) (reliance on sodomy convictions was a mechanism for disenfranchising black men).

consensual sodomy." *Id.* at 13a. The Report noted that another reason for repealing the sodomy laws was that they were "most often applied against homosexuals, both in enforcement of the statutes themselves and as a basis for discrimination against homosexuals on the ground that they are most likely violating the law." *Id.* at 12a.

At the time the ABA adopted the 1973 policy, nine States (Colorado, Connecticut, Delaware, Hawaii, Illinois, New Hampshire, North Dakota, Ohio, and Oregon) already had repealed their criminal laws prohibiting consensual adult sodomy; in another two States (Alaska and Florida), state courts had partially invalidated their laws. *See* Eskridge, *supra*, at 686 tbl. In the 30 years since then, such laws have been legislatively repealed or judicially invalidated in all but 13 States. Pet. 4, 24.

Since 1973, the ABA has also adopted many policies urging the elimination of sexual orientation discrimination. *See* pages 2-3, *supra*. Many leading law firms have implemented nondiscrimination policies that parallel the recommendations of the ABA.[6] Law schools likewise have proscribed sexual orientation discrimination in compliance with ABA policy.[7] The success of nondiscrimination policies

[6] For example, a review of forms submitted by law firms to the National Association for Law Placement (NALP) reveals that 81 of the nation's 100 top revenue-producing law firms indicated that they have nondiscrimination polices that expressly apply to sexual orientation. *See, e.g.*, App., *infra*, 17a-19a. Moreover, several other major law firms, whose responses on their NALP forms did not so indicate, specify on their websites that they have such policies. *Cf.* Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2001*, at 5 (59% of Fortune 500 companies have adopted policies to prohibit sexual orientation discrimination); E.J. Graff, *Welcoming the Invisible Bar: Lesbian and Gay Attorneys*, Diversity & the Bar, June 2002, at 13 (collecting examples, including Texas-based Gardere Wynne Sewell LLP, in which openly gay and lesbian lawyers serve in key management positions in law firms).

[7] *See* American Bar Ass'n, *Standards for Approval of Law Schools*, Standard 210(a) (2002) (requiring ABA-accredited law schools to "foster

(Continued on following page)

adopted by legal employers and law schools demonstrates the irrationality of discrimination based on sexual orientation.

Finally, state courts across the nation have determined that qualified gay men and lesbians should not be denied admission to the legal profession because of their sexual orientation. In the past, a number of States had excluded known gay men and lesbians from the bar on the rationale that their presumed violation of criminal sodomy laws meant that they did not meet the "good moral character" requirement. *See, e.g.*, *Florida v. Kimball*, 96 So.2d 825 (Fla. 1957); *In re Boyd*, 307 P.2d 625 (Cal. 1957); *cf.* Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law*, 40 B. Examiner 17, 20 (1971) (in anticipation of bar's "moral character" requirement, about one-third of law schools would "take a hard look at . . . homosexual activity before admitting an applicant"). But state bars all across the nation, even in States that still criminalize sodomy, have since rejected that rationale and revised their rules and policies to permit gay and lesbian applicants to become licensed attorneys based on the determination that whether one engages in consensual same-sex sodomy does not affect whether one is of "good moral character." *See, e.g.*, *Florida Bd. of Bar Exam'rs re N.R.S.*, 403 So.2d 1315 (Fla. 1981); XIV La. Sup. Ct. R. XVII, § 5(G)(1) (2002). Indeed, not only have all States ceased the practice of excluding gay men and lesbians from the legal profession, but a majority of state courts have adopted policies to protect lesbian and gay lawyers, litigants, and court

and maintain equality of opportunity in legal education . . . without discrimination or segregation on ground of race, color, religion, national origin, sex, or sexual orientation" in admissions and hiring); Law School Admission Council, *Out & In: Information for Lesbian, Gay, Bisexual & Transgendered Law School Applicants* 3, 6-11 (2001) (reporting that all 178 laws schools that responded to survey had policy prohibiting sexual orientation discrimination and listing 118 law schools with openly gay and lesbian faculty members).

personnel from manifestations of bias and prejudice, in keeping with the ABA's Model Code of Judicial Conduct.[8]

2. Despite the improved treatment of many gay men and lesbians in society, and within the legal profession in particular, the retention of criminal laws that single out same-sex conduct continues to encourage irrational discrimination.

Laws that criminalize private same-sex intimate conduct, even those not regularly enforced, serve to legitimize discrimination, hatred, and even violence against gay men and lesbians. By branding gay and lesbian citizens as lawbreakers, such laws impose a government-sanctioned stigma that impedes the efforts of gay men and lesbians to obtain equal justice under law. *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103 (2000); Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 Yale L. & Pol'y Rev. 169 (1997).

Despite the progress that has been made in eliminating discrimination within the legal profession and society as a whole, criminal sodomy laws are still cited as a justification for discrimination against gay and lesbian Americans. In a recent study, one law firm in Virginia explained that it does "not employ and would not knowingly employ a homosexual attorney" because sodomy "is a

[8] More than 30 States, including seven of the States that make sodomy a criminal offense, expressly prohibit judges from manifesting bias or prejudice based on sexual orientation in the performance of their judicial duties. *See, e.g.*, Fla. C.J.C. Canon 3(5) (2002); Idaho C.J.C. Canon 2(C) (2002); Kan. Sup. Ct. R. 601A Canon 3(B)(5) (2002); Miss. C.J.C. Canon 3(B)(5) (2002); Okla. Stat. tit. 5, app. 4, Canon 3(B)(4) (2003); Tex. C.J.C. Canon 3(B)(6) (2002); Utah C.J. Admin. Canon 3(B)(5) (2002); *see also* Deborah L. Rhode & David Luban, *Legal Ethics* 53 (3d ed. 2001).

crime in Virginia" and "[i]t therefore would be wrong . . . for a law firm to employ homosexuals or condone homosexual conduct." *Report of the District of Columbia Bar Task Force on Sexual Orientation and the Legal Workplace* App. C, at 39 cmt. 166 (Mar. 1999). Similarly, the Texas Homosexual Conduct Law has been used to justify opposition to the candidacy of an openly gay justice of the peace. As one member of the candidate's own party argued, "whether you like it or not, there is a state law that prohibits sodomy in the state of Texas, and having a judge who professes to have a lifestyle that violates state law . . . is wrong." Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, Houston Voice, Nov. 8, 2002, at 1; *cf. Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 138 (N.D. Tex. 1981) (in suit for employment discrimination, supervisor in Dallas Police Department testified that he told a gay applicant that he would not be hired in part "because his sexual practices violated state law"), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982).

Criminal sodomy laws are also viewed by some members of society, including some participants in the legal system, as a justification for setting gay men and lesbians apart as second-class citizens not entitled to the same government protections as other members of society. *See* Leslie, *supra*, at 123-124. Such attitudes have been exhibited by some members of the judiciary in States that have such laws. For example, in 1988, a Texas judge explained his refusal to impose a life sentence on a defendant convicted of killing two gay men on the ground that "I don't much care for queers cruising the streets [and] . . . [I] put prostitutes and gays at about the same level . . . and I'd be hard put to give somebody life for killing a prostitute." Robert B. Mison, Comment, *Homophobia in Manslaughter*, 80 Cal. L. Rev. 133, 163 (1992). Similarly, a Florida judge presiding over a pre-trial hearing of defendants charged with beating a gay man to death in 1987 asked the prosecutor "That's a crime now, to beat up a homosexual?" and

when told that it was, responded, "Times really have changed." *Ibid.*[9] Because the existence of sodomy laws reinforces those attitudes, many gay men and lesbians who are crime victims are reluctant to come forward for fear that the focus will be on their status as putative lawbreakers rather than as victims. *See* Leslie, *supra*, at 125. That reluctance, in turn, contributes to the fact that gay men and lesbians are frequent victims of hate crimes. *See id.* at 122; Peter Finn & Taylor McNeil, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review* 2, 17 (1987).

Thus, even when not enforced, sodomy laws encourage irrational and arbitrary treatment of gay men and lesbians. Declaring Texas's Homosexual Conduct Law unconstitutional will remove that untenable justification for such conduct and will vindicate the rule of law.

B. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate Liberty and Privacy Interests Protected By The Due Process Clause And *Bowers v. Hardwick* Therefore Should Be Overruled.

The ABA's policy urging repeal of criminal sodomy statutes applies to all such statutes, whether they are facially neutral or targeted at homosexual conduct alone. That 30-year-old policy reflects the principle that intimate,

[9] *See also* Sherri Williams, *Judicial Reprimand Suggested*, Clarion-Ledger, Dec. 21, 2002, at 2B (reprimand recommended for Mississippi judge who wrote a letter to a newspaper stating "[i]n my opinion, gays and lesbians should be put in some type of mental institute"); State Bar of Arizona Web site, http://www.azbar.org/Sections/Committees/SOGI/summary.asp (state bar study found that 13% of judges and attorneys have observed negative treatment by judges in open court toward those perceived to be gay or lesbian, 45% have heard negative remarks about a lesbian or gay person in the context of a particular case, and 8% have heard court personnel indicate a preference not to work with a lawyer because he or she is perceived to be gay or lesbian).

sexual conduct between two consenting adults that occurs in the privacy of the home should not be the basis of a criminal conviction absent some truly compelling government interest.[10] In *Bowers v. Hardwick*, 478 U.S. 186 (1986), however, a sharply divided Court held that "homosexual sodomy" was not protected by the substantive component of the Fourteenth Amendment's Due Process Clause.

Although the doctrine of *stare decisis* should generally be followed, it "is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (overruling *Booth v. Maryland* (1987), and *South Carolina v. Gathers* (1989)), particularly in constitutional cases, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (overruling *Pennsylvania v. Union Gas Co.* (1989)).[11] Overruling a prior decision is particularly warranted when "facts, or an understanding of facts, [have] changed from those which furnished the claimed justifications for the earlier constitutional resolution[ ]." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 863 (1992) (discussing rationale for overruling *Lochner v. New York* and *Plessy v. Ferguson*). Viewed in the proper factual context, *Bowers*' holding is inconsistent with more recent precedents that reaffirm the Constitution's special protections for intimate association, bodily integrity, and activities that occur in the home. Moreover, *Bowers* rested on an incomplete account of the history surrounding the right at issue and

[10] In the present case, Texas conceded that it could establish no interest that would meet that requirement. Pet. App. 76a (at oral argument in the state appellate court, respondent's counsel could not "even see how he could begin to frame an argument that there was a compelling State interest").

[11] *See also Ring v. Arizona*, 122 S. Ct. 2428 (2002) (overruling *Walton v. Arizona* (1990)); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton* (1985), and *School Dist. of Grand Rapids v. Ball* (1985)); *United States v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin* (1990)); *Payne*, 501 U.S. at 828 n.1 (collecting cases from prior 20 Terms overruling 33 constitutional decisions).

inaccurate factual assumptions about the lives and family relationships of gay men and lesbians. Finally, *Bowers* cannot be reconciled with the Court's more recent decision in *Romer v. Evans*, 517 U.S. 620 (1996). For all these reasons, *Bowers* should be overruled.

1. *Bowers* should be overruled because the weight of this Court's modern precedents supports the conclusion that the right of consenting adults to engage in intimate human conduct implicates a fundamental liberty interest protected by the Due Process Clause and a more complete account of the history of sodomy laws supports that view.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this Court identified two "lines of decisions" in which the Court, for more than a hundred years, has recognized that the substantive component of the Due Process Clause protects "liberty relating to intimate relationships" and "personal autonomy and bodily integrity." *Id.* at 857; *see also Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 287-288 (1990) (O'Connor, J., concurring) (citing, *inter alia*, *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). In determining whether an adult's right to engage in private consensual, intimate conduct is a component of liberty protected as a substantive matter by the Due Process Clause, the Court need only look to those lines of decisions, particularly to *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Carey v. Population Services International*, 431 U.S. 678 (1977).

In *Griswold*, the Court held that the State could not prohibit married couples from using contraception and thus concluded that the State could not require married couples to refrain from non-procreative sexual activity. *Carey* extended that holding to unmarried persons. While the majority in *Carey* framed that right in terms of the "right to decide to prevent conception" and disclaimed any

broader holding, 431 U.S. at 688 n.5, the Court's ruling did not protect merely a right to abstain from sexual relations. Rather, that decision and *Griswold* mean that adults have a right to be free of state interference in deciding whether and how to conduct their intimate sexual relationships. Justice Powell acknowledged as much in describing the right at issue as "the constitutionally protected privacy in decisions concerning sexual relations." *Id.* at 711 (Powell, J., concurring in part and concurring in judgment).

By characterizing *Griswold* and *Carey* as involving only the right not to procreate, *Bowers* failed to capture the full scope of the right at issue in those cases. As the Court has since explained in *Casey*, those opinions and their predecessors were rooted in the second Justice Harlan's conclusion that the Due Process Clause includes "a freedom from all substantial arbitrary impositions and purposeless restraints." 505 U.S. at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)). The same rule-of-law principles of individual autonomy and privacy that informed the recommendations of the ALI and ABA to repeal criminal sodomy laws are reflected in the *Casey* Court's conclusion that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851. Because *Griswold* and *Carey* establish that substantive due process protects the right of consenting adults to engage in intimate sexual conduct in the privacy of their homes, this Court should overrule *Bowers* and hold that the Texas Homosexual Conduct Law violates the Constitution.

Bowers sought to distinguish those lines of cases by describing the interest at stake as the right to engage in "homosexual sodomy" and by suggesting that the long history of sodomy laws militates against constitutional protection of that right. But *Bowers* did not address the significance of the fact that it was not until the mid-20th Century that sodomy laws singled out same-sex intimate conduct. Historically, States prohibited certain forms of

sexual conduct among *all* adults, including both homosexual and heterosexual, both married and single. In 1868, the year of the Fourteenth Amendment's ratification, 32 of the then-37 States criminalized sodomy. *See Bowers*, 478 U.S. at 193. In all but one of those States, the criminal prohibition of sodomy included conduct engaged in by different-sex couples.[12] The laws were focused on particular conduct, rather than the identity of the participants. Indeed, under those laws, even the conduct of married couples could be punished. *See* John May, *The Law of Crimes* § 203 (2d ed. 1893) ("Sodomy . . . may be committed . . . by a man with a woman – his wife, in which case, if she consent, she is an accomplice."); *Honselman v. People*, 48 N.E. 304, 305 (Ill. 1897) ("this is a crime committed between two persons both of whom consent, and it may even be committed by husband and wife")).

Bowers provided no reasoned basis for disregarding that history of equivalent treatment of same-sex and different-sex sodomy and redefining the liberty interest at issue in a way that excludes intimate sexual conduct engaged in by persons of the same sex. More fairly viewed, the historical practice of criminalizing sodomy between consenting adults in private is essentially incompatible

[12] Between 1791 and 1868, no State enacted a law that "singled out sexual acts between men for special prohibition." Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1084 (1998). Sodomy laws enacted prior to 1791 in Connecticut, New Hampshire, and Massachusetts, arguably prohibited only male-male conduct. *See id.* at 1082 n.60. By the time the Fourteenth Amendment was ratified, however, two of those three States had amended their criminal sodomy laws so that they applied to male-female couples as well. *See id.* at 1084 nn.66 & 68 (laws of Connecticut and Massachusetts were amended in 1821 and 1805, respectively, in ways that made clear that sodomous conduct was proscribed for all couples). Indeed, there is some indication that the laws in those States had always prohibited male-female sodomy, as similar prohibitions had been interpreted to include sodomous conduct between a man and a woman. *See The King v. Wiseman*, 92 Eng. Rep. 774, 775 (K.B. 1716).

with the two "lines of decisions" identified in *Casey*, 505 U.S. at 857, and exemplified by *Griswold* and *Carey*. The holdings of those cases should control here.

2. *Bowers* should be overruled because it relied upon an improper narrowing of the Constitution's special protections for family and the home.

To deny same-sex couples constitutional protection from criminal prosecution for their private sexual conduct is also inconsistent with the decisions of the Court that recognize the heightened protection that the Constitution provides for conduct that takes place in the home. *See Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[i]t is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the [constitutional] offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property"); *see also Griswold*, 381 U.S. at 485-486; *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). The precincts of the home are no less inviolate when those residing within are gay or lesbian.

Bowers also relied upon inaccurate factual assumptions about the family relationships of gay men and lesbians. In so doing, *Bowers* discounted the effect on families of laws criminalizing private, consensual sexual conduct between adults of the same sex. In *Bowers*, the Court said that "[n]o connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated." 478 U.S. at 191. But since *Bowers* was decided, that connection has been well documented.

It is now known that hundreds of thousands of gay men and lesbians have stable relationships, are parents, and raise their children in a family setting. *See* D'Vera Cohn, *Count of Gay Couples Up 300%*, Wash. Post, Aug.

22, 2001, at A3 (Census Bureau reports 1.2 million people indicated in 2000 census that they live with a same-sex "unmarried partner"); Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 Demography 139, 150 (May 2000) (estimating, based on 1990 census data, that about 22% of partnered lesbians and 5% of partnered gay men are raising children in their home); *cf.* American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (Feb. 2002) (at least one million children in the United States, and likely many more, have at least one gay or lesbian parent). The Constitution protects families from state interference, *see Troxel v. Granville*, 530 U.S. 57 (2000), even when the family in question is not a "traditional" one. *See id.* at 98 (Kennedy, J., dissenting); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (plurality) (overturning criminal conviction on substantive due process grounds because "the Constitution prevents East Cleveland from standardizing its children – and its adults – by forcing all to live in certain narrowly defined family patterns").

Through its policies urging nondiscrimination on the basis of sexual orientation in adoption, child custody, and visitation, the ABA has repeatedly acknowledged the importance of ensuring that the laws do not undermine the stability of families formed by gay and lesbian couples. *See* page 2, *supra; see also* American Law Institute, *Principles of the Law of Family Dissolution* § 2.12(d) & (e) (2002) (recommending that States prohibit judges from considering sexual orientation or extramarital sexual conduct in determining legal custody of children); *id.* § 2.12 cmt. f reporter's notes (collecting studies showing that "there is no correlation between a parent's sexual identity and that of the child, and no diminution in measures of self-esteem or social adjustment" based on the sexual orientation of the parents; that "being raised by a homosexual parent is no worse for a child than being raised by a heterosexual parent"; and that "gay men and lesbians are no more likely to molest children than heterosexual adults"). Similarly, the

legal profession and corporate America now provide health and other benefits (including adoption leave) to gay men and lesbians for their domestic partners and their children.[13] Local governments have established domestic partnership registries and offer a range of benefits to gay and lesbian families, even in States with sodomy laws.[14]

As noted above, when the facts upon which a decision is premised have changed, or new information is brought to light, it is appropriate for the Court to revisit that decision. *See* p. 15, *supra*. Thus, as Justice Brandeis explained, "in cases involving [the application of the substantive component of the Due Process Clause], this court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly

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[13] For example, 57 of the nation's top revenue-producing law firms that reported to NALP that they prohibit discrimination on the basis of sexual orientation, *see* note 6, *supra*, and App., *infra*, 17a-19a, also indicated that they provide benefits to the same-sex partners of their employees. Moreover, as is the case with policies of nondiscrimination based on sexual orientation, *see* note 6, *supra*, a number of other major law firms provide more detailed information on their websites specifying that they offer such benefits. *See also Two Firms Rated Best for Working Moms*, N.Y. Lawyer, http://www.nylawyer.com/news/02/10/100102r.html, Oct. 1, 2002 (discussing firms offering adoption leave that affirmatively includes gay and lesbian attorneys); Mark Hansen, *Bolstering Benefits*, 84 A.B.A.J. 32 (1998) (before offering health and other benefits to partners of gay and lesbian employees, the Houston firm of Vinson & Elkins "surveyed other firms it regards as its peers, only to learn that many already offer such coverage"). Law schools likewise are providing such benefits to their employees and students. *See* Law School Admission Council, *supra*, at 6-11. Those actions reflect a more general trend in corporate policies. *See* Human Rights Campaign Foundation, *supra*, at 18 (reporting that 4,285 employers in all 50 States provide domestic partner health insurance benefits to same-sex partners).

[14] *See, e.g.*, Human Rights Campaign Foundation, *supra*, at 11-12, 15 (listing cities and counties that offer domestic partner health benefits and/or have domestic partner registries in Florida, Louisiana, Missouri, North Carolina, and Texas, all of which have sodomy laws).

ascertained." *Burnet v. Coronado Oil Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), *quoted with approval in Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).

3. *Bowers* should be overruled because it is inconsistent with *Romer v. Evans*.

In *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that a State violated the Equal Protection Clause by enacting a provision that was justified solely by a desire to deny gay men and lesbians the rights enjoyed by other citizens. *Romer*'s holding that the mere desire "to make [gay men and lesbians] unequal to everyone else" was not a legitimate governmental interest, *id.* at 635, is inconsistent with *Bowers*' holding that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was sufficient to justify a criminal sodomy law, 478 U.S. at 196. As the dissenting Justices in *Romer* observed, the majority's decision in *Romer* cannot be reconciled with the decision in *Bowers*. *See* 517 U.S. at 640-642 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.). Respondent admits as much when it asserts that *Bowers* permits a State to fine or imprison a homosexual for engaging in sodomy, but concedes (Br. in Opp. 19) that *Romer* would not permit a State to discourage an individual from engaging in sodomy by denying a "practicing homosexual[ ]" the opportunity to attend a public university. Given the inconsistency between *Bowers* and the subsequent decision in *Romer*, *Bowers* should be overruled. *See Agostini v. Felton*, 521 U.S. 203, 235-236 (1997) ("[S]tare decisis does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law.").

Romer applied long-settled Equal Protection Clause principles and has been cited with approval by the Court in a variety of settings. *See, e.g., Vacco v. Quill*, 521 U.S. 793, 799 (1997); *Columbia Union Coll. v. Clark*, 527 U.S. 1013, 1015 (1999) (Thomas, J., dissenting from the denial of certiorari).

Bowers has not fared as well. Lower courts have struggled with the scope of *Bowers*' holding, particularly after *Romer*. *See, e.g., Marcum v. McWhorter*, 308 F.3d 635, 645 (6th Cir. 2002) (Clay, J., concurring in judgment); *Sterling v. Burough of Minersville*, 232 F.3d 190, 194-195 (3d Cir. 2000); *Stemler v. City of Florence*, 126 F.3d 856, 873-874 (6th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 458 & n.12 (7th Cir. 1996); *James v. Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991). A number of state courts have rejected the reasoning of *Bowers* as inconsistent with rule-of-law norms. *See Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App.), *appeal denied* (Tenn. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

Indeed, the majority opinions of this Court have not embraced *Bowers*. In addition to the notable absence of any reference to *Bowers* in the Court's opinion in *Romer*, *Bowers*' analysis has not been relied upon in any majority opinion in a case involving the definition of "liberty" for purposes of substantive due process. *Cf. Casey*, 505 U.S. at 855 (discussing constitutional decisions that were overruled by the Court because related principles of law had developed that "left the old rule no more than a remnant of abandoned doctrine"). Nor has the holding of *Bowers* given rise to any individual or societal reliance that would warrant its retention despite its flaws. *Cf. id.* at 856, 858 (declining to overrule *Roe v. Wade*, "[e]ven on the assumption that the central holding of *Roe* was in error," because, in part, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). In the years since *Bowers* was handed down, its reasoning has been steadily undermined by subsequent legal developments in the States. Numerous States have repealed or invalidated

their criminal sodomy laws. *See* Pet. 24.[15] Thirteen States and hundreds of localities have enacted civil rights protections for gay men and lesbians in their stead.

In light of the Court's more recent decision in *Romer* holding that a desire to deny gay men and lesbians the rights enjoyed by other citizens is not a legitimate government interest, as well as the actions by States verifying the conclusion of *Romer* – decriminalizing sodomy, protecting gay men and lesbians from discrimination, and providing health and other benefits for the families of gay men and lesbians – *Bowers* should be overruled. That is particularly so because *Bowers* was "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings" of that decision, has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts." *Payne*, 501 U.S. at 828-830.

[15] Similar developments have taken place at the international level. Article 17(1) of the International Covenant on Civil and Political Rights prohibits signatories from engaging in "arbitrary or unlawful interference with [a person's] privacy, family, home or correspondence." 999 U.N.T.S. at 177. That provision is construed by the United Nations Human Rights Committee to prohibit a signatory from criminalizing consensual sodomy. *See Toonen v. Australia*, U.N. GAOR, Hum. Rts. Comm., 50th sess., 448th mtg. ¶¶ 8.2-8.6, U.N. Doc. CCPR/C/50/D/488/1992 (1994). Moreover, Article 26 of the Covenant, which requires that each country's law "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," 999 U.N.T.S. at 179, is construed to proscribe discrimination on the basis of sexual orientation. *See Toonen* ¶ 8.7. The Covenant was ratified by the United States in 1992. *See* 138 Cong. Rec. 8070-8071 (1992). A determination that the Texas Homosexual Conduct Law violates the Constitution would, in addition to comporting with rule-of-law principles underlying American jurisprudence, also bring the United States into compliance with its international commitments.

C. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate The Equal Protection Clause.

Even if the Court determines that *Bowers* should not be overruled, the judgment of the Texas Court of Appeals should be reversed because the Texas Homosexual Conduct Law is based on a classification that is not rationally related to a legitimate governmental interest and thus violates the Equal Protection Clause. This issue was not addressed in *Bowers*, *see* 478 U.S. at 196 n.8, but is particularly pertinent in this case because, unlike the facially neutral law in *Bowers*, the Texas Homosexual Conduct Law expressly applies only to homosexual conduct.

1. The Texas Homosexual Conduct Law discriminates against gay men and lesbians by criminalizing conduct by same-sex couples that is not criminal when engaged in by different-sex couples.

The Equal Protection Clause is designed to prevent legislative excesses by requiring "the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *see also Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."). The Texas Homosexual Conduct Law violates that fundamental tenet of the rule of law by substantially limiting gay and lesbian couples from engaging in sexual intimacy but permitting heterosexuals (married or single) to engage in intimate acts that Texas concedes are the "same act[s]" that are prohibited for homosexuals. Br. in Opp. 18. Those acts are defined by Texas law as "deviate sexual intercourse" regardless of who engages in them, *see* Tex. Pen. Code § 21.01(1), but

Texas criminalizes the conduct only when it is engaged in by same-sex couples.

That disparate treatment of homosexual and heterosexual sodomy is a modern development that reflects the unwillingness of the majority to be subject to the same strictures imposed upon the minority. *See* p. 18, *supra*. In 1962, when the ALI recommended the repeal of all criminal sodomy laws involving consenting adults, every State had a criminal law that prohibited all sodomy, regardless of the sex or sexual orientation of the couples involved. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 111 (2000). It was only in 1969, in response to that recommendation, that a State (Kansas) decriminalized sodomy for heterosexuals but not for same-sex couples. Seven other States (Arkansas, Kentucky, Missouri, Montana, Nevada, Tennessee, Texas) then followed suit and redefined their sodomy laws to single out same-sex conduct. *See* William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631, 664, 691.[16]

The partial repeals in those eight States thus attempted to cure the ALI's rule-of-law objection that the State was regulating private intimate conduct – conduct that was "anything but uncommon" among the heterosexual majority. American Law Institute, *Model Penal Code and Commentaries* § 213.2 cmt. at 363 (1980). In singling out gay men and lesbians, however, those States violated another rule-of-law requirement articulated by the ALI,

[16] Besides the Texas statute, only two States (Kansas and Missouri) still have in effect sodomy statutes that, on their face, criminalize only same-sex sodomy. Nevada repealed its same-sex sodomy statute in 1993; courts in Arkansas, Kentucky, Montana, and Tennessee invalidated their same-sex sodomy laws on state constitutional grounds after *Bowers*. *See* Eskridge, *supra*, at 633 n.11, 686 tbl. The sodomy law in Oklahoma, although written to encompass both heterosexual and homosexual sodomy, currently applies only to homosexual sodomy due to the judicial invalidation of the statute as it applied to heterosexual couples. *See Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986).

namely the evenhanded application of the criminal law. The discriminatory intent behind those changes was clear. For example, Arkansas repealed its general sodomy law in 1975 as part of a comprehensive criminal code revision (as recommended by the ALI's Model Penal Code and the ABA), but in 1977 enacted a new law prohibiting only same-sex sodomy. *See* Eskridge, *supra*, at 664, 687 tbl. The chief sponsor of the law claimed at the time that the new law was "aimed at weirdos and queers." Petition for Certiorari in *Limon v. Kansas*, No. 02-583, at 5 (Oct. 2002).

2. Under the Equal Protection Clause, the desire to harm and stigmatize members of a group, such as gay men and lesbians, is not a legitimate governmental interest.

The Equal Protection Clause provides that the State may not treat an individual differently from similarly situated individuals absent a rational basis for the differential treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). The classification created by the Texas Homosexual Conduct Law is not rationally related to any legitimate governmental objective. Respondent suggests that the law encourages "marriage" and "biological reproduction." Br. in Opp. 18. But there is no relationship between those interests and the classification at issue, which allows some unmarried people (heterosexuals) to engage in non-procreative intimate relationships while prohibiting other unmarried people (gay and lesbian couples) from engaging in the very same conduct. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7, 453-454 (1972) (even if State had power to prohibit distribution of contraceptives to all persons, State has no rational basis for prohibiting distribution of contraceptives only to unmarried persons).

Respondent also invokes tradition and history. Br. in Opp. 18-19. But those arguments cannot sustain the classification embodied in Texas's law, which criminalizes only homosexual sodomy and permits the heterosexual

sodomy that had, as a historical matter, been equally disfavored by the law. *See* page 18, *supra*. Rather than justifying the classification under the Equal Protection Clause, this deviation from historical practice should trigger a more "careful consideration" to determine whether it is "obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

Ultimately, the only rationale relied upon by Texas for prohibiting homosexuals from engaging in "the same act" that is lawful for heterosexuals is the "communal belief that the [homosexual] conduct is wrong and should be discouraged." Br. in Opp. 18, 19.[17] But that belief is not sufficient. As the Court held in *Romer*, mere disapproval of homosexuality does not constitute a "legitimate governmental purpose" for "singling out a certain class of citizens for disfavored legal status or general hardships." 517 U.S. at 634, 633. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Ibid.* (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). Indeed, exercises of government power based on considerations "such as

[17] Respondent also describes this "communal belief" in terms of "public morality." Br. in Opp. 15, 16, 18. But respondent's use of that label to describe the government interest does not negate the Court's obligation to determine whether the statutory classification is rooted in bias or prejudice. Experience teaches that prejudice sometimes is clothed in moral terms. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (lower court relied upon the "fact that [God] separated the races" to "show[ ] that he did not intend for the races to mix" in upholding anti-miscegenation law); *Moreno*, 413 U.S. at 535 n.7 (adverse treatment of households of unrelated persons originally defended on moral grounds). In this case, from its origins and effects, the Texas Homosexual Conduct Law leaves little doubt that the State's asserted interest in serving "public morality" is in reality nothing more than a desire to express its disapproval of gay people through the criminal law.

caprice, passion, bias, and prejudice are antithetical to the rule of law." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting).[18]

Texas thus has failed to articulate a legitimate governmental interest that is served by its Homosexual Conduct Law. Yet even if such an interest could be identified, Texas's conceded practice of "rarely, if ever, enforc[ing]" the law criminally, *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994), undermines any claim that the law actually furthers that interest. *See Furman v. Georgia*, 408 U.S. 238, 312-313 (1972) (White, J., concurring) ("common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct" and thus the decision to apply law to only a few individuals makes the government's interest "too attenuated"); *id.* at 310 (Stewart, J., concurring) (similar); *cf. Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940) ("Deeply embedded traditional ways of carrying out state policy ... are often ... truer than the dead words of the written text.").

The Texas Homosexual Conduct Law renders gay men and lesbians strangers to the law and brands them criminals for engaging in the same intimate consensual conduct that is lawful for the majority. Such misuse of the criminal

[18] The criminal sodomy law at issue here shares another common feature with the state enactment held unconstitutional in *Romer*. The provision in *Romer* barred localities from enacting statutes protecting gay men and lesbians from discrimination; state sodomy laws can serve as a functional bar to the enactment of laws prohibiting sexual orientation discrimination or hate crimes, particularly at the local level. As petitioners recount (Pet. 14-16), the existence of sodomy laws skews the political process by permitting opponents of these laws to label gay men and lesbians as criminals who should not be entitled to invoke the protections of the government and thus interferes with normal democratic processes. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153 n.4 (1938); *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring).

sanction is antithetical to the rule of law, which "implies equality and justice in its application." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). The Texas Homosexual Conduct Law should be declared unconstitutional.

CONCLUSION

For the reasons set forth above, the judgment of the Texas Court of Appeals should be reversed.

Respectfully submitted,

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JANUARY 2003

OFFICIAL POLICIES AND CONSTITUTIONAL AMENDMENTS OF THE AMERICAN BAR ASSOCIATION

1. Policy adopted by the House of Delegates, August 1973

Be It Resolved, That the legislatures of the several states are urged to repeal all laws which classify as criminal conduct any form of non-commercial sexual conduct between consenting adults in private, saving only those portions which protect minors or public decorum.

2. Policy adopted by the House of Delegates, February 1979

Be It Resolved, That the American Bar Association favors the ratification by the United States of the International Covenant on Civil and Political Rights and urges the Senate to give its advice and consent to ratification of the Covenant subject to the following reservations, declarations, statements and understandings recommended to the Senate by the Departments of State and Justice (and an understanding on "right to life"):

A. The Constitution of the United States and Article 19 of this Covenant contain provisions for the protection of individual rights, including the right of free speech, and nothing in this Covenant shall be deemed to require or authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States.

B. The United States' adherence to Article 6 (concerning the "right to life") is subject to the Constitution and other laws of the United States.

C. The United States reserves thæ right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishmentt.

D. The United States does not adlhere to Paragraph (5) of Article 9 or to the thmird clause of Paragraph (1) of Article 15 (compensation for unlawful arrest, and retroactive lighter criminal penalties).

E. The United States considers the (prisoner segregation and rehabilitation stamdards) rights enumerated in Paragraphs (2) andl (3) of Article 10 as goals to be achieved progresssively rather than through immediate implementtation.

F. The United States understamds that subparagraphs (3)(b) and (d) of Article 14 do not require the provision of court-appointed counsel when the defendant is financially able to retain counsel or for petty offenses for which imprisonment will not be imposed. The Unitted States further understands that Paragraph ((3)(e) does not forbid requiring an indigent defendlant to make a showing that the witness is necessary for his attendance to be compelled by the court. The United States considers that provissions of United States law currently in force consstitute compliance with Paragraph (6). The Unitted States understands that the prohibitiom on double jeopardy contained in Paragraph (77) is applicable only when the judgment of acquiittal has been rendered by a court of the same governmental unit, whether the Federal Governnment or a constituent unit, which is seeking a neew trial for the same cause.

G. The United States declares that the (natural resources utilization) right referred to in Article 47 may be exercised only in accordance with international law.

H. The United States shall implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant.

I. The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

3. Policy adopted by the House of Delegates, August 1987

BE IT RESOLVED, That the ABA condemns crimes of violence including those based on bias or prejudice against the victim's race, religion, sexual orientation, or minority status, and urges vigorous efforts by federal, state, and local officials to prosecute the perpetrators and to focus public attention on this growing national problem.

4. Policy adopted by the House of Delegates, August 1989

BE IT RESOLVED, That the American Bar Association urges the Federal government, the states and local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public

accommodations. "Sexual orientation" means heterosexuality, bisexuality and homosexuality.

5. Policy adopted by the House of Delegates, August 1990

BE IT RESOLVED, That the American Bar Association adopts the Model Code of Judicial Conduct (August 1990), as amended, including the Preamble, Terminology Section, Canons, text, Commentary and Application Section, to replace the ABA Code of Judicial Conduct (adopted August 1972, as amended August 1982 and August 1984).

6. Policy adopted by the House of Delegates, August 1991

BE IT RESOLVED, That the American Bar Association supports the enactment of authoritative measures requiring studies of the existence, if any, of bias in the federal judicial system, including bias based on race, ethnicity, gender, age, sexual orientation and disability, and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch.

BE IT FURTHER RESOLVED, That the American Bar Association urges that such studies include the development of remedial steps to address and eliminate any bias found to exist.

7. Policy adopted by the House of Delegates, February 1992

BE IT RESOLVED, That the American Bar Association opposes any efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers

who contravene university policies by discriminating on the basis of sexual orientation.

8. Amendment adopted by the House of Delegates, August 1992

PROPOSAL: Amend the Constitution to provide that the National Lesbian and Gay Law Association (hereinafter "NLGLA") is an affiliated organization.

Amend Section 6.8(a)(1) to read as follows:

(1) The American Judicature Society, the American Law Institute, the Association of American Law Schools, the Conference of Chief Justices, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of Women Judges, the National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women's Bar Associations, the National Lesbian and Gay Law Association and the National Organization of Bar Counsel.

9. Policy adopted by the House of Delegates, August 1994

BE IT RESOLVED: That Standard 211 of the American Bar Association Standards for the Approval of Law Schools be amended to read as follows:

(a) The law school shall maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ground of race, color,

religion, national origin, sex or sexual orientation.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis or race, color, religion, national origin, sex or sexual orientation.

(c) The denial by a law school of admission to a qualified applicant will be treated as made upon the ground of race, color, religion, national origin, sex or sexual orientation if the ground of denial relied upon is

(i) a state constitutional provision or statute that purports to forbid the admission of applicants to a school on the ground of race, color, religion, national origin, sex or sexual orientation; or

(ii) an admissions qualification of the school that is intended to prevent the admission of applicants on the ground of race, color, religion, national origin, sex or sexual orientation though not purporting to do so.

(d) The denial by a law school of employment to a qualified individual will be treated as made upon the ground of race, color, religion, national origin, sex or sexual orientation if the ground of denial relied upon is an employment policy of the school which is intended to prevent the employment of individuals on the ground of race, color, religion, national origin, sex or sexual orientation though not purporting to do so.

(e) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of

students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) the religious affiliation, purpose or policies do not contravene any other Standard, including Standard 405(d) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex or sexual orientation. This Standard permits religious policies as to admission, retention and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application.

(f) Equality of opportunity in legal education includes equal opportunity to obtain employment. Each school should communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity and will avoid objectionable practices such as

(i) refusing to hire or promote members of groups protected by this policy because of the prejudices of clients or of professional or official associates;

(ii) applying standards in the hiring and promoting of such individuals that are higher than those applied otherwise;

(iii) maintaining a starting or promotional salary scale as to such individuals that is lower than is applied otherwise; and

(iv) disregarding personal capabilities by assigning, in a predetermined or mechanical manner, such individuals to certain kinds of work or departments.

10. Policy adopted by the House of Delegates, August 1995

RESOLVED, That the American Bar Association supports the enactment of legislation and the implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.

11. Policy adopted by the House of Delegates, August 1996

RESOLVED, That the American Bar Association urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias.

12. Policy adopted by the House of Delegates, February 1999

RESOLVED, That the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the

adoption is determined to be in the best interests of the child.

13. Policy adopted by the House of Delegates, August 2002

RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shared a mutual, interdependent, committed relationship with a victim of terrorism or other crime can qualify for crime victim compensation and assistance funds provided by that government to eligible spouses.

FURTHER RESOLVED, That eligibility for such funds should be determined without reference to intestate succession laws and should not affect the operation of such laws.

14. Amendment adopted by the House of Delegates, August 2002

Amend §6.4(e) of the Constitution to read as follows:

§6.4(e) A state or local bar association may not be represented in the House if its governing documents discriminate with respect to membership because of race, sex, religion, creed, color, national origin, ethnicity, age, persons with disabilities and/or sexual orientation.

REPORT NO. 2 OF THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION*

Be It Resolved, That the legislatures of the several states are urged to repeal all laws which classify as criminal conduct any form of noncommercial sexual conduct between consenting adults in private, saving only those portions which protect minors or public decorum.

REPORT

This resolution and report were approved by the Council of the Section of Individual Rights and Responsibilities at its May 12, 1973, meeting in Washington, D.C. An identical resolution was passed by the Section of Criminal Law on February 11, 1973. The Executive Council of the Young Lawyers Section passed a similar resolution on May 20, 1972,[1] and the Law Student Division adopted the same position at the 1972 Annual Meeting.[2]

The concern of the Section in urging adoption of this resolution is twofold: first, that enforcement of laws relating to private, consenting, noncommercial sexual conduct between adults requires an expenditure of enforcement manpower that could better be used to protect public safety and necessitates police practices that are often reprehensible or unsavory; and, second, that such

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* The recommendation was approved. See page 473.

[1] The resolution of the Young Lawyers Section is annexed as Exhibit A to this report.

[2] The resolution of the Law Student Division is annexed as Exhibit B to this report.

laws impinge on the constitutionally protected zone of privacy that surrounds each individual and serve no valid state purpose.

The purpose of the proposal is neither to advocate nor condemn any particular form of sexual activity between consenting adults. Such questions are best left to the private morals and conscience of each individual. This report is concerned only with what in our society should be the proper scope of the criminal law. The Council of the Episcopal Diocese of New York has clearly articulated the position which underlies this report:

> In matters of private morality, the State rightly seeks to give the protection of the law to the young, the innocent, the unwilling, and the incompetent. However, while adultery, fornication, homosexual acts, and certain deviant sexual practices among competent and consenting adults may violate Judeo-Christian standards or moral conduct, we think that the Penal Law is not the instrument for the control of such practices when privately engaged in, where only adults are involved, and where there is no coercion. We favor repeal of those statutes that make such practices among competent and consenting adults criminal acts.[3]

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[3] Statement, *On Private Sexual Morality*, adopted by the Council of the Episcopal Diocese of New York, March 18, 1971. *See also Resolution On Homosexuals and the Law*, adopted April 12, 1969, by the Council for Christian Social Action of the United Church of Christ: "Even while we proclaim a unity under God which transcends our division . . . we still honor variations among men in their political loyalties, lifestyles, and sexual preferences."

The philosophy of government underlying this view was long ago stated by John Stuart Mill:

> The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[4]

With respect to laws concerning consensual sodomy or the "crime against nature," eight states – Colorado, Connecticut, Delaware, Hawaii, Illinois, North Dakota, Ohio, and Oregon – have already removed such provisions from their penal codes. Such revision was recommended by the Model Penal Code of the American Law Institute.[5] A similar recommendation – subsequently enacted into law – was made by the Commission on Homosexual Offenses and Prostitution in Great Britain.[6] Such provisions apply to both heterosexual and homosexual conduct, but are most often applied against homosexuals, both in enforcement of the statutes themselves and as a basis for discrimination against homosexuals on the ground that they are most likely violating the law.[7]

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[4] J.S. Mill, *On Liberty*

[5] American Law Institute, *Model Penal Code* §207, Comment 227-78 (Tent. Draft No. 4, 1955).

[6] *Report of the Commission on Homosexual Offenses and Prostitution, Great Britain* (1963).

[7] Thus, in *Matter of Kimball*, 40 NY A.D. 2d 252 (2d Dept. 1973), the New York Appellate Division for the Second Department, in a case involving the application of an acknowledged homosexual for admission to the Bar, stated: "Accordingly, so long as this statute is in effect (Penal Law §130.38), homosexuality, which, in its fulfillment, usually entails commission of such a statutorily prescribed act, is a factor which could militate against the eligibility of an applicant for admission to the Bar

(Continued on following page)

A task force of the National Institute of Mental Health has recommended repeal of such provisions to help alleviate this discrimination and the resulting harm it causes the affected individuals.[8]

Further, there is a serious question of the constitutionality of such statutory prohibitions against consensual sodomy. The language of some of the statutes is so vague that it renders the statute unconstitutional.[9] Others are of questionable validity as a result of extensions of the doctrine of the right of privacy, particularly with respect to the body.[10] Those which create classifications based on marital status,

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who proposes to pursue this way of life in disregard of the statute." 40 A.D. 2d at 257. *See* the discussion of discrimination against homosexuals in Report of the Commission on Sex & Law and the Committee on Civil Rights of the Association of the Bar of the City of New York, Intro. 475, 28 *Record of the Assoc. of the Bar of the City of New York* 148 (1973). *See also Government Created Employment Disabilities and the Homosexual,* 82 *Harv. L. Rev.* 1738 (1969); *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County,* 13 *U.C.L.A. L. Rev.* 643 (1969).

[8] The report of the task force states: "We believe that most professionals working in this area – on the basis of their collective research and clinical experience and the present overall knowledge on the subject – are strongly convinced that the extreme opprobrium that our society has attached to homosexual behavior, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency." *Final Report of the Task Force on Homosexuality,* National Institute of Mental Health, October 10, 1969, published in *SIECUS Newsletter*, Vol. VI, No. 2, December 1970, pp. 3-12, at p. 10. *See also Position Paper on Homosexuality and Mental Illness,* National Association for Mental Health, October 17, 1970.

[9] Franklin v. Florida, 257 So. 2d 21 (Fla. 1971).

[10] Roe v. Wade, ___ U.S. ___, 35 L. Ed. 2d 147 (1973); Doe v. Bolton, ___ U.S. ___, 35 L. Ed. 2d 201 (1973); Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510 (1965).

such as the New York statute,[11] are subject to constitutional attack on that basis also as establishing a discriminatory classification.[12]

The constitutional weakness of the sodomy statutes as a result of expansion of the right of privacy also extends to statutory prohibitions on adultery and fornication.[13] Penal Code provisions against adultery and fornication are seldom enforced, in any event.[14] The Model Penal Code of the American Law Institute also recommended deletion of these provisions from the criminal law.[15]

It is the view of this Section that, even aside from the question of the constitutionality of statutory prohibitions on sodomy, adultery, and fornication, these provisions should be eliminated from the criminal law for the reason stated in the Model Penal Code: "No harm to the secular interests of the Community is involved in atypical sexual practice in private between consenting adult partners."[16] The consequence of this, as stated by St. Thomas Aquinas,

[11] N.Y. Penal Law §130.38.

[12] Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349 (1972).

[13] United States v. Moses, 41 U.S.L.W. 2298 (D.C. Super. Ct., Crim. No. 17778-72, Nov. 3, 1972), held that Congress could not constitutionally prohibit fornication, sodomy, or adultery among consenting adults.

[14] *See* New York County Lawyers Association Committee on Civil Rights, *Report of the Committee for Proposed Changes in the New York State Penal Law in Regard to the crimes of Adultery, Consensual Sodomy, and Prostitution* (February 2, 1973).

[15] *Model Penal Code, op. cit.*

[16] *Id.*

is that "(P)rivate sin is different from public crime, and only the latter lies in the province of man-made law."[17]

One significant effect of attempting to enforce private morality which has only in recent years begun to be fully appreciated is the strain such efforts place on the police by diverting their energies and manpower from enforcement of violent crimes. This effect has been explored through investigations by many groups, including the Commission on Correctional Facilities and Services of the American Bar Association; the San Francisco Committee on Crime; the New York State Legislative Hearings on Victimless Crimes; the National Alliance for Safer Cities; the President's Crime Commission; and the National Council on Crime and Delinquency.[18] The consensus of these groups is that a change in attitude about the function of the criminal law and elimination of many offenses relating to morality from the criminal codes are necessary steps to free the police to concentrate on violent crimes. Further, there is concern over the methods the police must use to enforce such provisions.[19]

[17] Quoted in statement of Rev. Leon A. Dickinson, Jr., Secretary for Chaplains and Religion and Health, United Church of Christ, at New York State Legislative Hearings on Victimless Crime (New York City, Sept. 13, 1971).

[18] For a summary of the recommendations of these and other groups on the question of victimless crimes, *see* E. Kiester, *Crimes with No Victims* (Alliance for a Safer New York, 1972). See also Olivieri and Finkelstein, *Report on "Victimless Crime" in New York State*, 18 *N.Y. Law Forum* 77 (1972).

[19] New York City Police Commissioner Patrick Murphy has stated: "By charging our police with responsibility to enforce the unenforceable we subject them to disrespect and corruptive influences (and) provide the organized criminal syndicates with illicit industries upon which

(Continued on following page)

This report is not to be taken as advocating elimination of all the so-called "victimless crimes." It has been urged that some of the crimes so classsified do in fact often have victims. Prostitution is the most frequently cited example, where either the prostitutee or the patron may suffer assault. The resolution here proposed would not urge legalization of prostitution, but would apply only to noncommercial sexual activities. Norr does it recommend repeal of existing provisions which protect minors and the public decorum. Rather, we urge the retention of these provisions. The Section does urge, however, that other offenses regarding noncommercial sexxual conduct between consenting adults in private are thee types of "victimless crimes" which should be eliminated frrom the criminal law.

For all the reasons stated above, we urge adoption of the resolution by the House of Delegaates.

McNeill Smith
Chairman

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they thrive." Quoted in *Crimes Without Victiims*, *supra*, note 18, at p. 3. The New York County Lawyers Association Report, *supra*, note 14, at pp. 3-4, states that the enforcement methods used in the area of consensual sodomy "bring our police forces into disrepute: they border on seduction and entrapment."

A Sampling Of Major Law Firms That Have Policies Specifically Prohibiting Discrimination Based On Sexual Orientation*

Akin, Gump, Strauss, Hauer & Feld
Andrews & Kurth
Arnold & Porter
Baker & Hostetler
Baker & McKenzie
Baker Botts
Bingham McCutchen
Brobeck, Phleger & Harrison
Bryan Cave
Buchanan Ingersoll
Cadwalader, Wickersham & Taft
Cahill Gordon & Reindel
Chadbourne & Parke
Cleary, Gottlieb, Steen & Hamilton
Covington & Burling
Cozen O'Connor
Cravath, Swaine & Moore
Davis Polk & Wardwell

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* These 81 firms are all among the 100 top revenue-producing law firms as listed in *The AmLaw 100*, The American Lawyer, July 2002, at 125. Information about the firms' policies was based on the firms' responses submitted to the National Association for Law Placement. *See* National Association for Law Placement, *Directory of Legal Employers* (2002), also available at http://www.nalpdirectory.com. Only firms whose anti-discrimination policies expressly reference sexual orientation are included. As noted above, *see* Br. 10 n.6, several other major law firms, whose responses on their NALP forms did not indicate they have such policies, specify on their websites that they do have such policies.

Debevoise & Plimpton
Dechert
Dorsey & Whitney
Duane Morris
Finnegan, Henderson, Farabow, Garrett & Dunner
Foley & Lardner
Fried, Frank, Harris, Shriver & Jacobson
Gibson, Dunn & Crutcher
Goodwin Procter
Greenberg Traurig
Hale & Dorr
Haynes & Boone
Heller Ehrman White & McAuliffe
Holland & Knight
Howrey Simon Arnold & White
Hunton & Williams
Jenner & Block
Jones, Day, Reavis & Pogue
Katten Muchin Zavis
Kaye Scholer
Kilpatrick Stockton
King & Spalding
Kirkpatrick & Lockhart
Latham & Watkins
LeBoeuf, Lamb, Greene & MacRae
Mayer, Brown, Rowe & Maw
Milbank, Tweed, Hadley & McCloy
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
Morgan, Lewis & Bockius
Morrison & Foerster
Nixon Peabody
O'Melveny & Myers

Orrick, Herrington & Sutcliffe
Paul, Hastings, Janofsky & Walker
Paul, Weiss, Rifkind, Wharton & Garrison
Pillsbury Winthrop
Piper Rudnick
Proskauer Rose
Quarles & Brady
Reed Smith
Ropes & Gray
Schulte Roth & Zabel
Seyfarth Shaw
Shaw Pittman
Shearman & Sterling
Sidley Austin Brown & Wood
Simpson Thacher & Bartlett
Skadden, Arps, Slate, Meagher & Flom
Squire Sanders & Dempsey
Stroock & Stroock & Lavan
Sullivan & Cromwell
Swidler Berlin Shereff Friedman
Testa, Hurwitz & Thibeault
Thelen Reid & Priest
Troutman Sanders
Vinson & Elkins
Wachtell, Lipton, Rosen & Katz
Weil, Gotshal & Manges
White & Case
Willkie Farr & Gallagher
Wilmer, Cutler & Pickering
Wilson Sonsini Goodrich & Rosati
Winston & Strawn

Supreme Court, U.S.
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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF OF THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ACTION WISCONSIN, THE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, THE BAY AREA TRANSGENDER LAWYERS' ASSOCIATION, GAY AND LESBIAN LAWYERS OF PHILADELPHIA, GAY AND LESBIAN LAWYERS ASSOCIATION OF SOUTH FLORIDA, GAYLAW, THE LESBIAN AND GAY LAW ASSOCIATION OF GREATER NEW YORK, THE LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES, THE LESBIAN AND GAY BAR ASSOCIATION OF CHICAGO, THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION, THE MINNESOTA LAVENDER BAR ASSOCIATION, THE NORTHWEST WOMEN'S LAW CENTER, THE OREGON GAY AND LESBIAN LAW ASSOCIATION, THE STONEWALL BAR ASSOCIATION, THE TOM HOMANN LAW ASSOCIATION OF SAN DIEGO, AND THE WASHINGTON LESBIAN AND GAY LEGAL SOCIETY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are a variety of organizations across the country that work to advance equality rights and are concerned about the impact of the Texas Homosexual Conduct Law. Amici include two national organizations, the National Lesbian and Gay Law Association and the Asian American Legal Defense and Education Fund, and several state and local organizations: Action Wisconsin, the Bay Area Lawyers for Individual Freedom, the Bay Area Transgender Lawyers' Association, Gay and Lesbian Lawyers of Philadelphia, Gay and Lesbian Lawyers Assocation of South Florida, GAYLAW, the Lesbian and Gay Law Association of Greater New York, the Lesbian and Gay Lawyers Association of Los Angeles, the Lesbian and Gay Bar Association of Chicago, the Massachusetts Lesbian and Gay Bar Association, the Minnesota Lavender Bar Association, the Northwest Women's Law Center, the Oregon Gay and Lesbian Law Association, the Stonewall Bar Association, the Tom Homann Law Association of San Diego, and the Washington Lesbian and Gay Legal Society.[1]

INTRODUCTION

Petitioners John Geddes Lawrence and Tyron Garner were arrested, jailed, and convicted for consensual intimate conduct in the privacy of the home. The law under which they were convicted, Texas Penal Code § 21.06, entitled "Homosexual Conduct," criminalizes sexual acts of same-

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[1] A complete list of amici and their statements of interest are set forth in Appendix A. Counsel for amici were the sole authors of this brief. No other person or entity made a monetary contribution to the preparation or submission of this brief. Amici have obtained the consent of the parties to file this brief. Letters of consent are on file with the Clerk of the Court.

sex couples while allowing heterosexual couples to engage in the same acts.

The Texas Homosexual Conduct Law violates principles that are basic to the Equal Protection Clause of the Fourteenth Amendment. As this Court reiterated in *Romer v. Evans*, 517 U.S. 620, 632 (1996), animosity toward a group of people is not a legitimate purpose for governmental discrimination against such a group. The State of Texas acknowledges, however, that its discriminatory sexual conduct law is justified solely by the fact that the "electorate evidently continues to believe" that such a discriminatory law correctly reflects the majority's moral views. Cert. Opp. 18. As Petitioners' Brief makes clear, the Texas law fails muster even under the least stringent level of judicial scrutiny—that of rational basis review. In the words of the dissenters below, "[t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict." Pet. App. 44a.[2]

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[2] It is well established that government may not act solely to enshrine into law the negative attitudes or distaste of a majority of the population for a distinct sub-group of the public, whether the object of the distaste is interracial couples, mentally retarded individuals, or hippies, and whether the motivation for such distaste is religious, moral, or aesthetic. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes . . . unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest").

Nevertheless, should this Court choose to rule on the question whether classifications based on sexual orientation must satisfy a higher standard than rational basis review—an action that was unnecessary in *Romer*—this Court should rule that such classifications warrant heightened scrutiny.[3] That issue is the subject of this brief.

Because the concept of heightened judicial scrutiny has developed to protect basic principles of equal protection, however, the considerations addressed in this brief should inform this Court's equal protection analysis under any level of judicial scrutiny.

SUMMARY OF ARGUMENT

Courts generally accord wide deference to legislative actions, upholding them as long as they are rationally related to a legitimate governmental interest. In limited circumstances, however, this Court has instructed that heightened judicial scrutiny is demanded by principles of

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[3] The level of scrutiny that this Court applies is important because it affects issues beyond this case. For example, while the Court in *Romer* did not *hold* that classifications based on sexual orientation deserve only rational basis review, some courts have misread the Court's opinion in *Romer* to stand for that proposition. *See, e.g., Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002); *Zavatsky v. Anderson*, 130 F. Supp. 2d 349, 356 (D. Conn. 2001). Moreover, given the Court's recent jurisprudence regarding the scope of Congressional power to authorize suits for money damages against the states pursuant to Section 5 of the Fourteenth Amendment, *see, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), the standard of review ultimately established by a court for classifications based on sexual orientation will carry relevance for Congressional action as well.

equal protection and by the need to ensure that the political process does not target groups out of bias or antipathy.

Under this Court's decisions, legislative actions that classify persons on the basis of a characteristic warrant heightened scrutiny if they meet two essential criteria: (1) the characteristic is unrelated to ability, and (2) the group disfavored by the classification has experienced a history of intentional discrimination. Two other considerations—the immutability of a trait and the political powerlessness of the group holding that trait—are not essential, but, to the extent they are present, they may enhance the need for heightened scrutiny by highlighting the invidiousness of a classification.

Because sexual orientation satisfies these criteria, governmental actions that classify on the basis of sexual orientation should be subjected to heightened scrutiny. First, sexual orientation is a trait that is unrelated to a person's abilities. Second, gay people have experienced a history of intentional, vehement discrimination that continues to the present. Furthermore, sexual orientation is "immutable" in the relevant sense—that it is not chosen and not readily changed—and gay people face discrimination and other obstacles in the political process that have limited their political power relative to other groups.

ARGUMENT

I. COURTS APPLY HEIGHTENED SCRUTINY TO GOVERNMENTAL ACTIONS THAT ARE INHERENTLY SUSPECT.

The Equal Protection Clause of the Fourteenth Amendment requires that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal quotation marks omitted). However, it is a "practical necessity that most legislation

classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer*, 517 U.S. at 631. Given the reality of legislative activity, and the federalism and separation of powers principles that preclude courts from intruding upon a legislature's role, this Court has developed an equal protection jurisprudence under which a legislature's classifications are generally upheld so long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985).

It is basic to principles of equal protection, however, that "the Constitution 'neither knows nor tolerates classes among citizens.'" *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). In order to ensure the protection of these principles in the face of legislative action by majorities, this Court developed the concept of a "more searching judicial inquiry" in situations where there is reason to suspect "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Thus, in limited circumstances—where discrimination against a group has been persistent, harmful, and unjustified, and government action is unusually likely to disfavor the group without basis—this Court has concluded that the Equal Protection Clause demands that governmental action be subjected to "heightened" or "skeptical scrutiny." *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996).[4] As its

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[4] This brief uses the phrase "heightened scrutiny" to refer to a level of judicial scrutiny that is more searching than rational basis review,

equal protection jurisprudence has evolved, this Court has applied heightened scrutiny in some form to legislative discrimination on the basis of a variety of characteristics, including national origin, race, alienage, gender, and illegitimacy. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national origin); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (race); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (gender); *Trimble v. Gordon*, 430 U.S. 762, 767 & n.12 (1977) (illegitimacy); *Virginia*, 518 U.S. at 531 (gender).

A review of this Court's jurisprudence indicates that there are two key elements that have been required to justify heightened scrutiny by the courts: (1) a lack of a relationship between the characteristic underlying a classification and the abilities of people with the characteristic, and (2) a history of discrimination against the group based on that characteristic.

A. The Lack Of A Relationship Between A Characteristic And Ability Is Essential For Application Of Heightened Scrutiny.

When a characteristic is irrelevant to an individual's ability to perform or participate in society, a law that classifies on the basis of such a characteristic is unlikely to be related to the achievement of any acceptable state interest. Such laws are instead more likely to "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440.

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rather than to a particular tier of review such as "strict" or "intermediate" scrutiny. *See* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237, 249-63 (1996) (reviewing development of tiers and criteria for application of heightened scrutiny).

Such laws may also, as gender-based classifications often do, "reflect outmoded notions of the relative capabilities" of those who possess such characteristics. *Id.* at 441. In such circumstances, the lack of a relationship between the characteristic and a person's abilities gives rise to a concern that the governmental classification is not the result of "legislative rationality in pursuit of some legitimate objective," but rather a reflection of "deep-seated prejudice." *Plyler*, 457 U.S. at 216 n.14.

In contrast, when a characteristic affects a person's general ability or capacities (even if the same characteristic may also give rise to unfounded discrimination), heightened scrutiny has not been accorded. For example, in *Cleburne*, the Court declined to subject classifications based on mental retardation to heightened scrutiny primarily because "it is undeniable . . . that those who are mentally retarded have a reduced ability to cope with and function in the every day world." 473 U.S. at 442. Because mental retardation provides legitimate reasons to classify in various areas (for example, in special education laws or in vocational rehabilitations laws), the Court was reluctant to subject all laws classifying on the basis of mental retardation to heightened judicial scrutiny. *Id.* at 442-43; *see also Frontiero*, 411 U.S. at 686 ("[W]hat differentiates sex from such non-suspect statuses as intelligence and physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

B. A History Of Discrimination Based On A Characteristic Is Essential For Application Of Heightened Scrutiny.

There are many characteristics that are generally unrelated to ability and yet do not merit heightened scrutiny. These could include characteristics ranging from having red hair, to being left-handed, to being a lover of opera. While a

court could invalidate legislative actions based on such classifications if it found that they lack any rational relationship to a legitimate governmental purpose, a court would not subject these classifications to heightened scrutiny. This is because they would not meet the second element that this Court has required to justify applying heightened scrutiny—that there be a history of intentional, invidious discrimination against the group *because of* the characteristic. *See Plyler*, 457 U.S. at 217 n.14; *Cleburne*, 473 U.S. at 443; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

For example, in *United States v. Virginia*, this Court explained that the Court's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history"—in particular to the Nation's "'long and unfortunate history of sex discrimination.'" 518 U.S. at 531 (quoting *Frontiero*, 411 U.S. at 684). In *Frontiero*, the plurality reviewed at length the "gross, stereotyped distinctions between the sexes" and blatant discrimination against women that existed throughout much of the nineteenth century, observing that while "the position of women in America has improved markedly in recent decades . . . women still face pervasive, although at times more subtle, discrimination." 411 U.S. at 685-86 (footnotes omitted).

In contrast, when this Court concluded in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), that classifications based on age do not warrant heightened scrutiny, the Court's primary explanation was that elderly individuals "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *See also Cleburne*, 473 U.S. at 443. Similarly, when faced with the claim that nuclear families (comprising parents, children, and siblings) should receive heightened scrutiny, this Court gave that claim short shrift, in

part because of the lack of any history of discrimination or antipathy against that group. *Lyng*, 477 U.S. at 638; *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987).

C. Although They Are Neither Necessary Nor Sufficient, Additional Factors May Enhance The Justification For Heightened Scrutiny.

In addition to the two essential factors noted above, this Court's decisions suggest that two other factors may provide additional justifications for applying heightened scrutiny. These two factors are the "immutability" of a characteristic and the political powerlessness of those possessing it. Neither of these factors, however, has been held by this Court to be necessary to justify the application of heightened scrutiny, nor have these factors on their own justified the application of such scrutiny.

1. Immutability

When this Court concluded that classifications based on race and national origin should be accorded strict scrutiny, it did not rest its analysis on the notion that race and national origin are "immutable" characteristics. *See Korematsu*, 323 U.S. at 216; *McLaughlin*, 379 U.S. at 191-92; *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Rather, the Court relied on broad, general statements of principle.[5]

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[5] *See, e.g., Korematsu*, 323 U.S. at 216 ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); *McLaughlin*, 379 U.S. at 191-92 ("central purpose of the Fourteenth Amendment was to eliminate racial discrimination . . . [and t]his strong policy renders racial classifications constitutionally suspect") (internal quotation marks omitted).

The "immutability" argument rose to prominence due to the effort by legal advocates to persuade the Court to accord heightened scrutiny to classifications based on gender. One of the salient arguments historically used to justify discriminatory treatment of women was that "natural" inherent differences existed between the sexes. The "immutability" argument, presented by advocates of gender equality, "flipped the meaning of biology" by arguing that the inherent, immutable nature of sex, and the individual's lack of control over that characteristic, made "using it to justify inferior treatment all the more invidious and unfair."[6]

In *Reed v. Reed*, 404 U.S. 71, 73 (1971), the Court considered the constitutionality of an Idaho law that explicitly provided that "males must be preferred to females" when both were equally entitled to administer an estate. The appellant's brief in *Reed* explicitly argued that race and sex were both immutable characteristics that equally deserved "suspect classification" status.[7]

Although the Court did not adopt appellant's argument in *Reed*,[8] two years later a plurality of the Court concluded in

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[6] Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & Pol'y 397, 402-03 (2001); *see also* Donald Braman, *Of Race and Immutability*, 46 UCLA L. Rev. 1375, 1453 (1999).

[7] "Although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an *unalterable* identifying trait over which the individual *has no control* and for which he or she should not be disadvantaged by the law." Brief for Sally M. Reed, at 5, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-430) (emphasis added) (discussed in Hunter, *supra*, at 403).

[8] The Court, applying rational basis review, invalidated the law as making "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." *Reed*, 404 U.S. at 76.

Frontiero, 411 U.S. at 682, that classifications based on sex, like those based on race, alienage, and national origin, are "inherently suspect" and deserving of "close judicial scrutiny." While the key factor for the Court was the Nation's "long and unfortunate history of sex discrimination," the Court added that "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities ... because of ... sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'"[9]

In *Frontiero*, this Court recognized that other immutable characteristics, such as "intelligence or physical disability," are not accorded suspect status. 411 U.S. at 686. The Court observed that what distinguishes sex from these other statuses is the first key factor noted above: "the sex characteristic frequently bears no relationship to ability to perform or contribute to society." *Id.*

The Court's "immutability" analysis has thus been used to accentuate the unfairness of applying discriminatory laws to groups whose characteristics have little relation to their abilities and who have experienced a history of discrimination based on such characteristics. But the fact that a characteristic is immutable, such as mental retardation, has not been sufficient to justify the application of

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[9] *Frontiero*, 411 U.S. at 685, 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). In *Weber*, the Court relied on the fact that illegitimate children were not responsible for their births not as a factor to heighten the standard of review, but rather as an explanation of why the penalty visited upon illegitimate children in the statute at issue was irrational and unjust. 406 U.S. at 175-76. This factor was used in a similar manner in *Plyler*, 457 U.S. at 219-20. *See generally* Feldblum, *supra*, at 253-56.

heightened scrutiny. *See Cleburne*, 473 U.S. at 440-41, 442 n.10 (casting doubt on immutability theory). Correspondingly, the fact that a status has an "element of voluntariness," that is, a behavioral aspect (such as resident alien status), does not eliminate the basis for heightened scrutiny if the other factors exist. *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).

2. Political Powerlessness

This Court has never held that political powerlessness is essential to the application of heightened scrutiny. The Court did not discuss political powerlessness when it applied heightened scrutiny to classifications based on race, ethnicity, illegitimacy, or gender.[10] Only in a case concerning alienage did the Court affirmatively state that aliens deserve "heightened judicial solicitude" because "aliens—pending their eligibility for citizenship—have no direct voice in the political processes." *Foley v. Connelie*, 435 U.S. 291, 294 (1978) (internal quotation marks omitted). The Court has also suggested in dicta that "political powerlessness" may be relevant to the question whether heightened scrutiny is appropriate.[11]

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[10] In *Virginia*, the Court noted that women were denied the right to vote for over a century, but it did so in describing the Nation's "long and unfortunate history of sex discrimination." 518 U.S. at 531 (internal quotation marks omitted). Similarly, in *Frontiero*, the plurality discussed the underrepresentation of women in the political arena, but it did so as an example of the "pervasive, although at times more subtle, discrimination" against women. 411 U.S. at 686.

[11] In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), the Court noted that a class "unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts . . . [has] none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected

Most of the groups currently accorded heightened scrutiny by the Court, however, are not "politically powerless" in the sense that "they have no ability to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. Indeed, today most racial, ethnic, and religious minority groups and women have representatives from their groups in state and national legislatures, work in coalitions, enjoy the support of political figures, and are protected by national, state, and local antidiscrimination laws. *See* Marvin Caplan, *A History of the Leadership Conference on Civil Rights, in Leadership Conference on Civil Rights 45th Anniversary* 10 (1995).

Political powerlessness, therefore, is a relative concept which may enhance the need for close scrutiny of government decision-making. It may strongly support heightened scrutiny if a group is effectively closed out of the political process completely. *See Foley*, 435 U.S. at 294. Other groups that are not completely shut out of the political process, and that can attract the attention and support of some politicians, may nevertheless have experienced a history of exclusion from the political process. Such exclusion and marginalization may have resulted from the fact that such individuals were denied the right to vote, or because representatives of the group were unlikely to be

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to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." In *Cleburne*, after concluding that mental retardation is a characteristic that affects the ability of individuals to perform and that legislatures were responding to the concerns of people with mental retardation in a manner "that belies a continuing antipathy or prejudice," 473 U.S. at 443, the Court also noted that the legislative response negates the claim that people with mental retardation are "politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445.

elected, or because it was difficult for such groups to organize or to form coalitions. If such factors exist, they buttress the need for stricter judicial oversight of legislative action targeting the particular group.

II. GOVERNMENTAL ACTIONS THAT CLASSIFY ON THE BASIS OF SEXUAL ORIENTATION WARRANT HEIGHTENED SCRUTINY.

An application of the conceptual framework established by this Court's equal protection jurisprudence demonstrates that governmental classifications based on sexual orientation deserve heightened scrutiny. Sexual orientation satisfies the two essential elements warranting heightened scrutiny: it is a characteristic unrelated to general ability, and there is a long history of discrimination against gay men, lesbians, and bisexuals based solely on that characteristic. The features of immutability and relative political powerlessness are also present, providing further warning signs that heightened scrutiny is merited.

A. Sexual Orientation Is Unrelated To Ability.

It seems intuitively obvious to most people that an individual's intelligence or physical abilities will affect that individual's ability or capacity to perform certain activities. It is also an accepted proposition, at least at this point in our country's history, that race, gender, and religion do not correlate with an individual's ability or capacity.

Most people would also assume that an individual's *heterosexuality*, like that individual's race or gender, does not correlate with the individual's ability or capacity. Based on all the available scientific evidence, they would be correct. Similarly, an individual's *homosexuality* or *bisexuality* does not correlate with that individual's ability or

capacity to perform a range of societal activities. The once-prevalent view that homosexuality was a form of mental illness has long been rejected by the medical and scientific communities.[12]

The simple fact is that gay men, lesbians, and bisexuals demonstrate the same range of abilities as do heterosexual people: some are intellectually gifted, while others are not; some are strong, while others are not; some are mentally or physically disabled, but most are not. The constant factor is that the individual's *sexual orientation* is not the determinative element in any of these abilities.[13]

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[12] *See* Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techs. 17 (1957); John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public Policy* 115, 115-36 (James D. Weinrich & John C. Gonsiorek eds., 1991). The American Psychological Association and the American Psychiatric Association have affirmed for nearly three decades that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." American Psychiatric Association, *Resolution of the American Psychiatric Association* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974); American Psychological Association, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

[13] The events of September 11, 2001 provide a powerful example of this simple reality. One of the four individuals believed to have thwarted terrorists' plans to crash United Airlines Flight 93 was gay. *See* Evelyn Nieves, *Passenger on Jet: Gay Hero or Hero Who Was Gay?*, N.Y. Times, Jan. 16, 2002, at A12. The co-pilot of American Airlines Flight 77, which crashed into the Pentagon, was gay. *See* Steve Rothaus, *Couple's Deaths Bring a Special Pain*, Miami Herald, Sept. 20, 2001, at 2E. The 68-year-old New York Fire Department chaplain who attended to the last rites of dying firefighters in the World Trade Center and himself was killed by falling debris was gay. *See* Daniel J. Wakin, *Killed on 9/11, Fire Chaplain Becomes Larger Than Life*, N.Y. Times, Sept. 27, 2002, at A1. The cross-section of these and other gay people who died

B. Gay Men, Lesbians, And Bisexuals Have Suffered A Persistent History Of Discrimination.

Like women, and like racial and ethnic minorities, gay men and lesbians have experienced a history of purposeful and invidious discrimination.[14] This discrimination has been *because of* their particular sexual orientation, *i.e.*, because they are not heterosexual. It has been animated in some cases by religious or moral beliefs,[15] but most often by a general discomfort and lack of familiarity with gay people.[16] While the nature of discrimination against gay people has changed in recent years, *cf. Frontiero*, 411 U.S. at 686, that discrimination remains widespread and significant, and

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on September 11 demonstrates their diverse abilities and contributions to society: as nurses, educators, accountants, pilots, flight attendants, small-business owners, employees of the U.S. Army, bond traders, security guards, consultants, computer workers, firefighters, veterans, chaplains, churchgoers, adoptive parents, and partners in long-term, caring relationships. *See* http://www.angelfire.com/fl3/uraniamanuscripts/sept11.html (accessed Jan. 12, 2003).

[14] *See generally* William N. Eskridge, Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* 166-89 (1997). Every court that has addressed this issue has concluded that gay men and lesbians have been subject to a history of discrimination. *See High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987).

[15] *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting); *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998).

[16] *See* Gregory M. Herek & John P. Capitanio, *"Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Soc. Psychol. Bull. 412 (1996) (reporting data showing that heterosexuals with gay friends or family members have significantly more favorable attitudes toward gay people than those without such relationships).

demands heightened vigilance by the courts. *Cf. Virginia*, 518 U.S. at 531-32.

1. Early History of Discrimination

Overt and systematic discrimination against gay men and lesbians began in earnest after changes in our economic and social culture at the turn of the prior century led to the development of a "homosexual identity." *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 200-02; John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 226-27 (1988). These changes resulted in the development of gay communities in some urban centers. D'Emilio & Freedman, *supra*, at 288-91. Even this limited public visibility, however, resulted in a crackdown on the ability of gay people to congregate. For example, police raids on gay bars and arrests of patrons were common and continued well into the 1970s; patrons frightened of publicity rarely challenged any charges. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1565 (1993).

In the 1950s, governmental discrimination against gay men and lesbians intensified, setting a norm for private actors. D'Emilio & Freedman, *supra*, at 292-95. In 1950, a Senate Investigations Subcommittee concluded that homosexuals were unfit for federal employment because they "lack the emotional stability of normal persons" and recommended that all homosexuals be dismissed from government employment. Cain, *supra*, at 1566 (quoting S. Doc. No. 241-81, at 1 (1950)). In 1953, President Eisenhower issued Executive Order 10,450, which required the dismissal of all government employees who were "sex perverts," including homosexuals. *Id.* From 1947 through mid-1950, 1,700 individuals were denied employment by the federal government because of their alleged homosexuality.

Developments in the Law—Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1556 (1989).

2. Present-Day Discrimination Against Lesbians, Gay Men, and Bisexuals

Society's attitudes toward homosexuality have changed significantly over the past decade. Increasing numbers of gay people—including public figures—are no longer hiding their sexual orientation, thereby diminishing the historical lack of familiarity and social discomfort with gay people.

Nevertheless, homosexuality has been and continues to be associated with a variety of negative and inaccurate stereotypes—that gay people are inherently sick, that they are naturally promiscuous and incapable of having healthy long-term relationships, or that they are child molesters.[17] Most generally, many people express a deep visceral antipathy toward gay people.[18]

Gay men, lesbians, and bisexuals, like members of some ethnic and religious groups with a history of discrimination, are at times able to hide their distinguishing characteristic by disguising their personal interests, relationships, and

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[17] *See, e.g.*, Peter Sprigg, *A Missing Moral Link? Homosexual Men May Evolve Into Molesters*, Family Research Council, *at* http://www.frc.org/get/ar02e1.cfm (accessed Jan. 12, 2003); Family Research Council, *Talking Points: How Homosexual 'Civil Unions' Harm Marriage*, *at* http://www.frc.org/get/if00e1.cfm (accessed Jan. 12, 2003).

[18] *See* Herek & Capitanio, *supra*, at 419 (reporting that in representative nationwide survey, approximately 60% of heterosexual Americans agreed with the statements, "I think lesbians are disgusting," and "I think male homosexuals are disgusting").

activities. And because of the reality of discrimination, many gay people choose to hide their sexual orientation.

But this socially imposed pressure to "pass" is itself a form of discrimination. Constantly keeping secret an important part of one's identity can create shame, increase stress, and undermine physical as well as mental health.[19] This pressure to "pass" is akin to the pressure on Jews in the early to mid-1900s to hide their identity to improve their employment prospects,[20] or the decision by some African Americans who could "pass" as white to do so in order to avoid discrimination.[21] Whether the characteristic is race, religion, or sexual orientation, societal pressure to hide this identifying characteristic is a form of discrimination. *See* Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 811-36 (2002).

Because of the continued power of stereotyped views and deeply rooted prejudice, lesbians and gay men remain the victims of extensive discrimination based on their sexual orientation. Departing from heterosexual norms continues to subject an individual to widespread prejudice, ranging from everyday social interactions, to the ability to get and

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[19] *See* S.W. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 Health Psychol. 243 (1996); Gregory M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals' Attitudes Toward Lesbian and Gay Men*, *in Out in Force: Sexual Orientation and the Military* 211-12 (Gregory M. Herek et al. eds., 1996); Law, *supra*, at 212; Feldblum, *supra*, at 323-27.

[20] *See* Marc A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 Stan. L. & Pol'y Rev. 37, 46 (2001).

[21] *See generally* Randall Kennedy, *Racial Passing*, 62 Ohio St. L.J. 1145 (2001).

keep a job,[22] obtain housing,[23] maintain custody of one's children,[24] walk on the street in safety,[25] or—as demonstrated here—be free from arrest. Identification as a gay man, lesbian, or bisexual can serve as a "sole and sufficient justification for ostracism" "wherever [one] goes." *Boy Scouts of Am.*, 530 U.S. at 696 (Stevens, J., dissenting).

Prejudice against gay people continues to take the form of vitriolic hate crimes, often marked by unusual viciousness and brutality, such as the savage murders of Matthew Shepard and others.[26]

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[22] *See Texas v. Morales*, 826 S.W.2d 201, 202-03 (Tex. App. 1992) (Texas stipulated that its Homosexual Conduct Law "brands lesbians and gay men as criminals and thereby sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "employment, family issues, and housing"), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994).

[23] *See id.*

[24] *See, e.g.*, *D.H. v. H.H.*, No. 1002045, 2002 Ala. LEXIS 44, at *2-*3 (Feb. 15, 2002); *id.* at *12 (Moore, C.J., concurring) (regardless of whether father physically abused child, mother's lesbian relationship "alone is sufficient justification for denying that parent custody of . . . her own children"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (removing child from custody of mother and granting custody to grandmother because mother was a lesbian).

[25] *See, e.g.*, David Firestone, *Murder Reveals Double Life of Being Gay in Rural South*, N.Y. Times, Mar. 6, 1999, at A1 (reporting that there were no openly gay people in town, and quoting a gay man: "I would never in a public place grab my partner's hand and walk down the street. It would literally be a death wish.").

[26] *See, e.g.*, James Brooke, *Witnesses Trace Brutal Killing of Gay Student*, N.Y. Times, Nov. 21, 1998, at A9 (describing murder of Matthew Shepard, who was savagely beaten and pistol-whipped while being taunted "It's Gay Awareness Week," and then tied to a fence to

Non-lethal campaigns of harassment are marked by similar viciousness. Gay people frequently encounter shocking displays of hostility and prejudice in fora as diverse as workplaces,[27] schools[28] and the military.[29] And hate

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die); Francis X. Clines, *For Gay Soldier, A Daily Barrage of Threats and Slurs*, N.Y. Times, Dec. 12, 1999, § 1, at 33 (describing months of anti-gay taunts by man who bludgeoned Barry Winchell to death with a baseball bat while Winchell slept in army barracks); David Firestone, *Trial in Gay Killing Opens, To New Details of Savagery*, N.Y. Times, Aug. 4, 1999, at A8 (describing murder of Billy Jack Gaither, who was beaten, slashed through the throat, stuffed in the back of a car, killed with an ax, and then lit on fire after flirting with a man); Mark Holmberg, *Beheading Stuns Gay Community*, Richmond Times Dispatch, Mar. 7, 1999, at B1 (describing murder of homosexual Henry Edward Northington, whose decapitated head was carried through the woods and up 70 steps to a footbridge where gay people commonly congregated).

[27] *See, e.g.*, *Simonton v. Runyon*, 232 F.3d 33, 34-36 (2d Cir. 2000) (describing "all too familiar" "appalling persecution" of gay man by co-workers, including repeated anti-gay slurs, obscenities, references to AIDS, and placement of obscene pictures in his work area); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347, 351-52 (E.D.N.Y. 1999) (gay police officer was ridiculed as child molester, transvestite, and sadomasochist; fellow officers planted in his car a night stick labeled "dildo," hid his uniform and equipment, and put rocks in the hub caps of his car so that criminals would hear his approach).

[28] *See, e.g.*, *Nabozny v. Podlesny*, 92 F.3d 446, 451-52 (7th Cir. 1996) (openly gay student was spit and urinated on, subjected to "mock rape," taunted with epithets, and physically assaulted repeatedly for four years; principal responded, "if he was going to be so openly gay, he should expect such behavior from his fellow students" (internal quotation marks omitted)); Evelyn Nieves, *Attacks on a Gay Teenager Prompt Outrage and Soul Searching*, N.Y. Times, Feb. 19, 1999, at A14 (describing student who, after declaring himself gay and founding Gay-Straight Alliance at his high school, was beaten unconscious and awoke with the word "fag" scratched on his stomach and arms).

[29] *See* Christopher Marquis, *Military Discharges of Gays Rise, and So Do Bias Incidents*, N.Y. Times, Mar. 14, 2002, at A22 ("The number of

crimes on the basis of sexual orientation continue to increase, rather than decrease.[30]

The nature and persistence of discrimination against gay men and lesbians distinguish it from other governmental classifications. Indeed, the noteworthy characteristics of anti-gay discrimination—that it is so intense, so multifaceted, and so seemingly natural to so many—are signposts of invidious discrimination, and are shared by other forms of discrimination accorded heightened scrutiny under the Equal Protection Clause.[31] Further, discrimination

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military discharges of gays has risen to its highest level in 14 years, and reported incidents of anti-gay harassment have climbed by 23 percent in a year"); Elizabeth Becker, *Harassment in the Military is Said to Rise*, N.Y. Times, Mar. 10, 2000, at A14 ("Reports of anti-gay harassment in the military more than doubled last year"); Steven Lee Myers, *Survey of Troops Finds Antigay Bias Common in Service*, N.Y. Times, Mar. 25, 2000, at A1 (Pentagon survey found that 80% of service members reported hearing anti-gay remarks, and 37% reported witnessing or experiencing anti-gay harassment, including verbal remarks, graffiti, vandalism, threats, and physical assaults).

30 *Compare* FBI Uniform Crime Reports *Hate Crime Statistics* for 1995, http://www.fbi.gov/ucr/hatecm.htm (accessed Jan. 13, 2003) *with Hate Crime Statistics* for 2001, http://www.fbi.gov/ucr/01hate.pdf (accessed Jan. 13, 2003) (showing 36% increase in hate crimes based on sexual orientation).

31 *See Boy Scouts of Am.*, 530 U.S. at 696 (Stevens, J., dissenting); John Stuart Mill, *The Subjection of Women, in Three Essays* 427, 439-41 (1975) (power over women, Blacks, and other unjustly dominated groups is marked by feature that it "appear[s] natural to those who possess it"); Samuel A. Marcosson, *Constructive Immutability*, 3 U. Pa. J. Const. L. 646, 714 (2001) (There is "an infinitely broad[], historical national practice of punishing any expression of deviation from the norm of heterosexuality. This pattern operates across the entire spectrum of our national life and profoundly affects every person in America, straight and gay, almost from the moment we are born. . . . These pressures . . . are symptomatic of a system of subordination. This is true of sex

against gay people is closely tied to gender-based discrimination, which this Court has recognized as invidious.[32] The history and nature of discrimination based on sexual orientation thus present a powerful justification for close equal protection scrutiny.

C. The Factors Of Immutability And Political Powerlessness Support Heightened Scrutiny For Governmental Classifications Based On Sexual Orientation.

As noted above, this Court has never held that the factors of immutability and political powerlessness are essential to the application of heightened scrutiny. However, these factors support the application of heightened scrutiny to classifications based on sexual orientation.

1. Immutability

There is current consensus in the scientific community that, whether an individual's sexual orientation is caused by genetic makeup, hormonal factors, social environment, or a combination of such factors, none of these factors is generally under an individual's control—and none supports the notion that an individual *chooses* his or her sexual orientation. *See* Chandler Burr, *A Separate Creation* 8-13 (1996); Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual*

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discrimination . . . [a]nd it has long been true of the racial caste system as well.").

32 *See* J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2361 (1997) ("The social bias against homosexuality is part of the preservation of traditional gender roles and stereotypes, which are both heterosexual and patriarchal.").

Adults, 67 J. Consulting & Clinical Psychol. 945 (1999). Akin to race, national origin, gender, and illegitimacy, sexual orientation is a trait for which an individual is not directly responsible.

Moreover, regardless of the causes of sexual orientation, there is consensus that a person's sexual orientation generally cannot be changed by a simple decision-making process or by psychological or medical intervention. *See* Douglas Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psychol. 221, 224 (1994); Eli Coleman, *Changing Approaches to the Treatment of Homosexuality, in Homosexuality: Social, Psychological and Biological Issues* 81-88 (W. Paul et al. eds., 1982). As Judge Norris observed in *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (concurrence), we do not assume that *heterosexuals* can simply "shift the object of their sexual desires to persons of the same sex." Science indicates that the same is true of persons with a homosexual orientation.

Indeed, there is an extensive history of attempts to "cure" people of homosexuality, including through brutal measures such as shock therapy and mutilation. *See* Yoshino, *supra*, at 784-811. The scientific community has concluded overwhelmingly that such measures are not only futile, but unhealthy and abusive.[33] Even if a person's sexual orientation *could* be modified in some circumstances through psychological or behavioral techniques, that would not make

[33] Every major mental health organization has adopted a policy statement cautioning the profession and the public about the potential abuses of so-called "conversion" or "reparative" therapies. These policy statements are reproduced on the website of the American Psychological Association at http://www.apa.org/pi/lgbc/publications/justthefacts.html (accessed Jan. 7, 2003).

gay people as a class unworthy of legal protection, nor would it render anti-gay discrimination any less objectionable.[34] It would be repugnant to suggest that forced change of a person's sexual orientation, even if it were possible, is the only means by which a gay person could avoid disabilities imposed by society.

2. Political Powerlessness

Gay people have historically been excluded as effective participants in the political system and face systematic impairments to political power. Only recently have openly gay people dared to run for public office, and the number of openly gay elected officials in this country remains miniscule. Only 239 (less than .05%) of the 511,039 elected officials currently serving in the United States are openly gay, according to the Gay and Lesbian Victory Fund. There are only three openly gay members of the U.S. Congress.[35]

[34] As stated by Judge Norris in *Watkins*: "It is clear that by 'immutability' the court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining the class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed." 875 F.2d at 726 (concurrence).

[35] *See* David Crary, *Aside From One Setback in Nevada, Gay Causes and Candidates Fare Well in Election*, Associated Press., Nov. 6, 2002 (three openly gay members of Congress before and after election). In *Frontiero*, a plurality of this Court observed that "[t]here has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives." 411 U.S. at 686 & n.17. Gay men and lesbians constitute an even smaller fraction of federal officeholders. Moreover, there is only one openly gay judge in the entire federal judiciary. *See* William B. Rubenstein, *Queer Studies II*, 8 UCLA Women's L.J. 379, 401 (1998). Michael R. Sonberg, *2002—The Cradle*

The political power of gay people as a group has been and continues to be profoundly affected by the fact that many gay people have historically kept their sexual orientation secret because of persistent discrimination and social stigmatization. Political organizers have faced the problem that they "somehow ... must induce each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may involve." Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 731 (1985).[36] Gay people's direct political voice and ability to build coalitions to achieve their legislative goals have thereby been stifled.

Gay people have been making political progress in recent years. Based on this limited and recent success, a few courts have concluded that classifications based on sexual orientation do not warrant strict scrutiny because gay people are "not without growing political power," *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989); *see also High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 n.10 (9th Cir. 1990); *accord Romer*, 517 U.S. at 637 (Scalia, J., dissenting). However, neither the existence of some openly gay representatives, *see Ben-Shalom*, 881

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of Liberty Awaits Us, *at* http://home.att.net/~ialgj/ialgjbody.html (accessed Jan. 14, 2003).

[36] *See also* Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What The Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 93-94, 97 (1991); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 970-973 (1989). In addition, "straights who support gays . . . risk being cast as gay themselves, and are deterred from expressing pro-gay sympathies." Kenji Yoshino, *Suspect Symbols*, 96 Colum. L. Rev. 1753, 1807-08 (1996).

F.2d at 466, nor the passage of some anti-discrimination laws, *see High-Tech Gays*, 895 F.2d at 574, establishes a degree of political power that undermines the justification for close scrutiny of anti-gay official measures.

As explained above, absolute political powerlessness has never been required by this Court for heightened scrutiny to apply. Indeed, if "growing political power" precluded heightened scrutiny, then race- and gender-based classifications would not have warranted such scrutiny (or would have outgrown it). In fact, gay people today have relatively little political power in spite of their few electoral achievements. *See* William N. Eskridge, Jr., *Gaylaw* 205 (1999) ("[t]here are today more antigay laws than ever before"); *id.* app. B (collecting laws); *supra* note 35. In mainstream political spheres, gay people—and the issues affecting the gay community—are considered appropriate targets for derision and exclusion.[37] In addition, there are many areas of the country where gay people have made very little political progress in the past two decades. In most parts of the country, particularly in non-urban areas, gay people have never been able to elect individuals from their own group and face poor prospects for doing so.

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[37] This is evidenced, for example, by the continuing use and apparent acceptability of anti-gay rhetoric in political discourse. In the last election, a South Carolina Democratic candidate for the U.S. Senate sought to undermine his opponent's endorsement by Rudolph Giuliani by saying, "[Giuliani's] wife kicked him out and he moved in with two gay men and a Shi Tzu. Is that South Carolina values?" Deroy Murdock, *A Few Good Men*, National Review Online, Nov. 18, 2002, *at* http://www.nationalreviewonline.com/murdock/murdock111802.asp. *See also* Philip Shenon, *Gay Philanthropist's Nomination to Become Ambassador to Luxembourg Dies in the Senate*, N.Y. Times, Oct. 20, 1998, at A12 (reporting that the fact that James Hormel was openly gay was deemed a sufficient reason to oppose (and defeat) his confirmation as Ambassador to Luxembourg).

Moreover, the limited political success of gay people as a group has brought with it significant obstacles in the form of focused campaigns to "wage war" against gay people's efforts to establish legal rights and social acceptance.[38] The past decade has seen a wave of ballot initiatives, proposed legislation, and lobbying efforts seeking to exclude gay people from the political process and to eliminate anti-discrimination protection, such as Colorado's Amendment 2, which "classifie[d] homosexuals . . . to make them unequal to everyone else." *Romer*, 517 U.S. at 635.

Like women and racial minorities, gay people contend with significant obstacles to effective political representation arising out of a history of invidious discrimination, providing additional support for heightened judicial scrutiny.

III. THIS COURT'S DECISION IN *BOWERS V. HARDWICK* DOES NOT PRECLUDE THE CONCLUSION THAT CLASSIFICATIONS BASED ON SEXUAL ORIENTATION DESERVE HEIGHTENED SCRUTINY.

A number of courts have concluded that this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), precludes the application of heightened scrutiny to classifications based on sexual orientation. This Court should reject that conclusion because *Bowers* did not decide the equal protection issue, either explicitly, *see id.* at 188 n.2, 196 n.8, or by necessary implication of its due process ruling.[39] Moreover, the incorrect premise of every court that

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[38] Richard Lacayo, *The New Gay Struggle*, Time, Oct. 26, 1998, at 32; *see also supra* note 17.

[39] *See* Cass. R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988); *Watkins*, 875 F.2d at 719 (Norris, J., concurring). Amici also contend that, for the reasons stated in Petitioners' Brief, *Bowers* is flawed as a matter of due process doctrine and should be overruled.

has relied on *Bowers* to apply rational basis review to sexual orientation classifications is that sodomy "defines the class" of gay people.[40]

"Sodomy" does not define the class of gay people. In fact, the Georgia statute at issue in *Bowers*, like most sodomy laws, defined a class that includes *both* homosexuals who engage in oral or anal sex *and* the significant number of heterosexuals who engage in oral or anal sex.[41] A class defined by the act of sodomy would be a class comprising both homosexuals and heterosexuals.[42]

Logically, what defines the class of homosexuals or heterosexuals is not the act of engaging in oral or anal sex—since both homosexuals and heterosexuals engage in those acts in large numbers. Rather, what defines the class is the gender of one's partner. *See* Nan D. Hunter, *Life After*

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[40] *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) ("If the Court was unwilling [in *Bowers*] to object to state laws that criminalize *the behavior that defines the class*, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.") (emphasis added); *see also Ben-Shalom*, 881 F.2d at 464 (same); *High Tech Gays*, 895 F.2d at 571 (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (same).

[41] *See* Robert T. Michael et al., *Sex in America* 140-41 (1994) (reporting a finding that heterosexuals engage in oral sex at a rate of approximately 75-80%).

[42] In contrast, the Texas Homosexual Conduct Law prohibits sodomy *only* when engaged in by same-sex couples. It thus classifies on the basis of sexual orientation for purposes of triggering heightened scrutiny.

Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 550-51 (1992). In short, what is fundamental to the nature of homosexuals, and what makes them different from heterosexuals, is that they desire a sexual and emotional attachment to a person of the same gender rather than of the opposite gender. In light of this reality, the Court's holding in *Bowers* is not an obstacle to the application of heightened scrutiny to classifications based on sexual orientation.

CONCLUSION

If this Court addresses the issue of the level of scrutiny to be accorded governmental classifications based on sexual orientation, it should conclude that such classifications warrant heightened scrutiny.

Respectfully Submitted,

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APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

ACTION WISCONSIN, founded in 1994, is a statewide organization dedicated to advancing and protecting the civil rights of lesbian, gay, bisexual, and transgender people. Action Wisconsin carries out this mission through education, advocacy, grassroots organizing, coalition-building, and electoral involvement. These efforts are designed to educate the general voting public, sensitize the media, promote a politically active and effective organizational membership, and better inform policy makers on issues of concern to our members.

THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy, and dissemination of public information. AALDEF has throughout its long history supported equal rights for all people including the rights of gay and lesbian couples.

THE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF) is a bar association of over 500 lesbian, gay, bisexual, and transgender members of the San Francisco Bay Area legal community. Since 1980, BALIF has sought to: (1) provide a forum for the exchange of ideas and information of concern to the lesbian, gay, bisexual, and transgender legal community; (2) discuss and take action on questions of law and the administration of justice as they affect the lesbian, gay, bisexual, and transgender community; (3) encourage and support the appointment of lesbian, gay, bisexual, and transgender attorneys to the judiciary, public agencies, and commissions throughout the Bay Area; and (4) promote the building of coalitions with other legal

organizations to combat all forms of discrimination. As part of that mission, BALIF actively participates in public policy debates and as amicus curiae in matters affecting the rights of its members and the lesbian, gay, bisexual, and transgender community at large.

THE BAY AREA TRANSGENDER LAWYERS' ASSOCIATION (BATLAW) is an organized grassroots nonprofit civil rights and educational group seeking to secure and safeguard the rights of all transgendered and Gender Variant persons. BATLAW's Mission is to educate and influence the legislature of the State of California, local governments, and business organizations on the issues and concerns of transgendered people, and to take what action is necessary to safeguard and to secure our rights as American citizens.

THE GAY AND LESBIAN LAWYERS OF PHILADELPHIA (GALLOP) is a bar association serving Southeastern Pennsylvania, New Jersey, and Delaware. Its purposes include promoting the civil and human rights of lesbians and gay men and assuring their fair and just treatment under the law. GALLOP continues a Pennsylvania tradition of advancing equal protection, dating from William Penn, including introduction of the Fourteenth Amendment in Congress by Thaddeus Stevens, a member of the Pennsylvania bar, on April 30, 1866. Stevens said he would "take all I can get in the cause of humanity and leave it to be perfected by better men in better times."

THE GAY AND LESBIAN LAWYERS ASSOCIATION (GALLA) OF SOUTH FLORIDA is a voluntary, nonprofit organization of the Florida Bar. We are the only such organization in the state of Florida recognized by the Bar. GALLA's purpose is to provide education and outreach on gay and lesbian legal issues to the multitude of

communities our members embrace - gay and non-gay, legal and non-legal.

GAYLAW was founded in 1990 as an independent, non-partisan bar association serving lesbian, gay, bisexual, and transgender lawyers, law students, and legal professionals in the National Capital area. GAYLAW works to advance the interests of the lesbian, gay, bisexual, and transgender community, to be their voice within the legal community, and to improve their professional lives. GAYLAW also provides Continuing Legal Education and public education seminars.

THE LESBIAN AND GAY BAR ASSOCIATION OF CHICAGO (LAGBAC) is a bar association of the lesbian, gay, bisexual, and transgender (LGBT) legal community in the Chicago metropolitan area. LAGBAC promotes the advancement of LGBT legal professionals and provides education and outreach on issues important to the LGBT community.

THE LESBIAN AND GAY LAWYERS ASSOCIATION OF LOS ANGELES (LGLA) is a 25-year-old organization of over 300 lesbian, gay, and bisexual attorneys in the Los Angeles area. It is an affiliate of the Los Angeles County Bar Association, and was a member of the Lobby for Individual Freedom and Equality (LIFE), the statewide lobby that, during its existence, monitored and worked for compassionate and sensible AIDS/HIV legislation and civil rights in Sacramento. LGLA has submitted and sponsored amicus briefs in many cases important to the gay and lesbian community.

THE LESBIAN AND GAY LAW ASSOCIATION OF GREATER NEW YORK (LeGaL) is a bar association of the lesbian, gay, bisexual, and transgender (LGBT) legal community in the New York City metropolitan area. LeGaL

promotes the advancement of LGBT legal professionals and fosters participation in pro bono activities in the community.

THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION (MLGBA) was founded in 1985 as a state-wide professional association of lawyers, judges, and law students to promote the administration of justice for all persons without regard to their sexual orientation or gender expression, educate the bar about issues affecting the lives of lesbians, gay men, bisexuals, and transgendered people and advocate for the enactment and enforcement of laws promoting equal rights for all. A key aspect of MLGBA's mission is to ensure that issues pertaining to sexual orientation are handled fairly and respectfully in the courts. MLGBA is affiliated with the Massachusetts Bar Association and the National Lesbian and Gay Law Association.

THE MINNESOTA LAVENDER BAR ASSOCIATION (MLBA) is an organization whose membership includes gay, lesbian, bisexual, and transgendered (GLBT) attorneys, academics, students, and others involved in the legal profession. Based largely in the Twin Cities area, MLBA seeks to educate the legal profession regarding GLBT legal issues, assure that the legal system responds appropriately to GLBT individuals and concerns, and encourage awareness by GLBT individuals of their legal rights. In 2001, the Minnesota Lavender Bar Association was a named plaintiff in *Doe et al. v. Ventura*, which resulted in a ruling that the Minnesota "sodomy" law violated the privacy guarantees of the state constitution. Consequently, MLBA takes an avid interest in the case at bar.

THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION (NLGLA) was founded in 1988 as a national association of lawyers, judges, and other legal professionals, law students, and affiliated lesbian, gay,

bisexual, and transgender legal organizations. Its mission is to promote justice within the legal profession for lesbians, gays, bisexuals, and transgenders in all their diversity. NLGLA has been an affiliate of the American Bar Association since August 1992. It has participated as amicus curiae in numerous state and federal court actions involving or implicating the rights of lesbians, gays, bisexuals, and transgenders.

THE NORTHWEST WOMEN'S LAW CENTER (NWLC) is a non-profit public interest organization that works to advance the legal rights of women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and securing equal rights for lesbians and their families, and has long focused on the threats to equality based solely on sexual orientation. Toward that end, the NWLC has participated as counsel and as amicus curiae in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. The NWLC continues to serve as a regional expert and leading advocate in lesbian and gay issues.

THE OREGON GAY AND LESBIAN LAW ASSOCIATION (OGALLA), a member of the Oregon State Bar Association, is an association of lesbian, gay, bisexual, and transgendered lawyers, judges, legal workers, law students, and those who support the association's purposes. OGALLA was founded in January 1991 to create a statewide organization to support the needs of lesbians, gay men, and other sexual minorities in the legal profession. OGALLA is associated with the National Lesbian and Gay Law Association, an affiliate of the American Bar Association.

THE STONEWALL BAR ASSOCIATION OF GEORGIA (SBA) was founded in 1995 to serve many

functions in the gay and the legal communities. The SBA is a professional association of attorneys, judges, law students, and other legal workers who support the rights of lesbian, gay, bisexual, and transgendered people and who oppose discrimination based upon sexual or gender orientation. SBA's membership includes not only lesbian, gay, bisexual, and transgendered persons, but our straight allies as well.

THE TOM HOMANN LAW ASSOCIATION OF SAN DIEGO (THLA) is San Diego's lesbian/gay/bisexual/transgender law association and is a California non-profit corporation. THLA was founded in 1991 by local attorneys and has over 140 members. The membership includes attorneys, judges, legal assistants, paralegals, law students, law professors, and other individuals in law-related fields, regardless of sexual orientation. THLA is committed to securing the basic human rights guaranteed to all citizens by the Constitution and laws of the United States and the State of California, with particular emphasis on securing the human and civil rights of lesbian, gay, bisexual, and transgendered people.

THE WASHINGTON LESBIAN AND GAY LAW SOCIETY (LEGALS) was incorporated in 1997 as an organization of lawyers, law students, law firm employees, judges, and court staff to promote the civil rights of sexual minorities in the State of Washington, provide access to justice and legal services to those in need, educate the legal profession and courts on legal issues relating to sexual orientation and the law, and oppose discrimination based on sexual orientation.

(16)

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

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BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. The instant case raises squarely the rights of free association, privacy, and equal protection under the rule of law and thus is of central concern to Cato and the Center.

STATEMENT OF THE CASE

Amicus adopts and incorporates Petitioners' statement of the case.

SUMMARY OF ARGUMENT

The Fourteenth Amendment requires that the state protect the fundamental liberties of its citizens, and that it do so on an equal basis. Texas's Homosexual Conduct Law violates both prongs of the constitutional assurance. By making only consensual "homosexual" sodomy illegal, the law violates the Equal Protection Clause as interpreted in *Romer v. Evans*, 517 U.S. 620 (1996). As in *Evans,* the statute here is a novelty in the law. Because consensual sodomy had become widely practiced and acceptable among the political

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[1] The parties' consent to the filling of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

mainstream by 1973, Texas narrowed the crime to "Homosexual Conduct." Like the law in *Evans,* Texas's law imposes a "broad and undifferentiated disability on a single named group," i.e., "homosexuals," and its "sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus against the class that it affects," gay people. *Id.* at 632.

There is a deeper problem with the Homosexual Conduct Law. America's founding generation established our government to protect rather than invade fundamental liberties, including personal security, the sanctity of the home, and interpersonal relations. So long as people are not harming others, they can presumptively engage in the pursuit of their own happiness. The Fourteenth Amendment's Privileges or Immunities Clause and its Due Process Clause (as interpreted by this Court) made this principle applicable to the states. A law authorizing the police to intrude into one's intimate consensual relations is at war with this precept and should be invalidated, for the same reasons this Court invalidated police intrusions into marital bedrooms, *Griswold v. Connecticut*, 381 U.S. 479 (1965); into home viewing of obscene materials, *Stanley v. Georgia*, 394 U.S. 557 (1969); and into the parental household, *Troxel v. Granville*, 530 U.S. 57 (2000). To be sure, this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), declined to read the Due Process Clause to protect consensual "homosexual sodomy." *Hardwick*, however, rested upon an incomplete understanding of Anglo-American legal traditions. For example, its survey identified sodomy laws with "homosexuality," when in fact nineteenth century sodomy laws applied to male-female as well as male-male activities (and did not apply to female-female activities). As understood in light of the common law and as applied, sodomy laws were aimed at public conduct and sexual activities that were not consensual. Because of its incomplete reading of history and its inconsistency with *Evans* and this Court's privacy precedents, *Hardwick*'s interpretation of the

Due Process Clause should be overruled. In the alternative, this Court should rule that the Privileges or Immunities Clause (not addressed in *Hardwick*) bars the states from criminalizing private sodomy between consenting adults.

ARGUMENT

I. FIRST PRINCIPLES: THE FOURTEENTH AMENDMENT REQUIRES THAT STATE CRIMINAL LAWS CLEARLY NOTIFY CITIZENS OF THEIR COVERAGE, NOT DISCRIMINATE ARBITRARILY AGAINST CLASSES OF PERSONS, AND RESPECT FUNDAMENTAL LIBERTIES.

The Framers of the Constitution and the Bill of Rights believed that government existed to protect the fundamental liberties of its citizens. The Framers of the Fourteenth Amendment elaborated upon this idea and applied it to the states. By their lights, the second sentence of Section 1 rendered the states accountable to three precepts: the legality principle, which requires the state to provide the citizenry with clear notice as to what conduct is criminal; the equality principle, which bars the state from applying the law arbitrarily or against a subordinated class; and the liberty principle, which requires the state to respect Americans' fundamental freedoms. Consistent with their expectations, this Court has vigorously enforced the legality principle under the Due Process Clause and the equality principle under the Equal Protection Clause. The liberty principle, originally embodied in the Privileges or Immunities Clause, has primarily been enforced under the Due Process Clause.

A. The Legality Principle

The Fourteenth Amendment's Due Process Clause was copied from the Fifth Amendment, which reflected the Magna Carta's concept of *per legem terrem*. For the government to act "according to the law of the land" requires

state officials to follow the rule of law and not their own biases. This Court has understood due process to require that criminal statutes give clear notice to the citizenry as to precisely what conduct is illegal, e.g., *McBoyle v. United States*, 283 U.S. 25 (1931), and to the police to assure that their discretion is strictly controlled. E.g., *Cox v. Louisiana*, 379 U.S. 559, 579 (1965) (Black, J.). Some of the precedents also support the idea that the state cannot criminalize conduct everyone engages in and then enforce the law only against marginalized citizens. E.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-63, 169-71 (1972).

B. The Equality Principle

The Declaration of Independence announced that "all men are created equal."[2] Applying this principle to the states, the Framers of the Fourteenth Amendment emphasized that "the American system rests on the assertion of the equal right of every man to life, liberty, and the pursuit of happiness." Cong. Globe, 39th Cong., 1st Sess. 1088-89 (1866).[3] This equality principle embodied two complementary norms: rationality and anti-caste. Foundational for the liberal state, the rationality norm insists that state differentiations be reasonably connected to legitimate public policies and not be the result of prejudice against an unpopular minority. Important for the peaceful functioning of pluralist democracies, the anti-caste norm debars the state from creating a subordinate underclass alienated from the law.[4]

[2] The Constitution and the Reconstruction Amendments cannot be properly understood without reference to the Declaration of Independence. See Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J. L. & Pub. Pol'y 63 (1989).

[3] On the drafting and ratification history, see William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988).

Although the immediate beneficiaries of this principle were the freed slaves, the Framers understood the principle to apply generally, for "there is no more effective practical guaranty against arbitrary and unreasonable government than to require the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). Applying this precept, this Court in *Romer v. Evans*, 517 U.S. 620 (1996), invalidated an antigay initiative. Because the initiative imposed special, pervasive disabilities on gay people, it was class legislation. See also *Plessy v. Ferguson*, 163 U.S. 537, 552-55 (1896) (Harlan, J., dissenting). Because its antigay exclusions were neither necessary nor sufficient to achieve traditional state objectives, the Court inferred that the initiative was a product of inadmissible antigay "animus," per se invalid under the Equal Protection Clause.

C. The Liberty Principle

The American Revolution and the Constitution of 1789 sought to secure the blessings of liberty.[5] The Declaration of Independence asserted that it was "self-evident" that men "are endowed by their Creator with certain unalienable Rights," to

[4] Introducing the proposed Fourteenth Amendment, Senator Howard said it would "abolish-all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866); see also Nelson, *supra* note 3 (thorough examination of the Framers' articulation of a general equality principle).

[5] See generally Roger Pilon, *On the First Principles of Constitutionalism: Liberty, Then Democracy*, 8 Am. U.J. Int'l L. & Pol'y 531 (1993).

wit: "Life, Liberty, and the Pursuit of Happiness." Among the rights the Framers had in mind were rights of personal security, or "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation"; of personal liberty to move about; and of personal property, namely, "[t]he free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land." 1 William Blackstone, *Commentaries on the Laws of England* *123-24, *125-29 (1765).

Consistent with the libertarian premises of Lockean social contract theory and Blackstonian common law, a premise of the Constitution was that We the People retained our traditional liberties, and the burden was on the government to justify any regulation thereof.[6] The same ideas applied to the states.[7] Before the Civil War, judges ruled that state common law or constitutional police powers justified "reasonable regulations as [legislators] may judge necessary to protect public rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others."[8] In *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), Justice Washington construed Article

[6] The Ninth Amendment explicitly recognizes unenumerated rights, and that was the intent of its Framers. See Randy Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989); see also *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998).

[7] See William Nelson, *Americanization of the Common Law: The Impact of Legal Change in Massachusetts Society, 1760-1830*, at 89-110 (1975) (shift in regulatory emphasis in Massachusetts from "enforcer and guardian of Christian society" to "preserver of individual liberty" after the Revolution).

[8] *Commonwealth v. Alger*, 61 Mass. 53, 102 (1853). For decisions striking down state laws for interfering with personal or property rights, see *Wynehammer v. People*, 13 N.Y. 378 (1856) (relying on Blackstone); *Sears v. Cottrell*, 5 Mich. 251, 253 (1858).

IV's Privileges and Immunities Clause to protect rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." *Id.* at 551.

When the Framers of the Fourteenth Amendment borrowed the due process and privileges and immunities language to frame rights in Section 1, they intended to protect fundamental liberties (including those in Blackstone and the Declaration) against state intrusion.[9] In *Union Pacific R. v. Botsford*, 141 U.S. 250 (1891), this Court recognized bodily integrity as a species of constitutionally-protected liberty. Accord, *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (joint opinion); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring). A second line of cases recognized the idea of physical inaccessibility for the home: the state is barred (unless it has good cause) from invading "the sanctities of a man's home and the privacies of life."[10] Accord, *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (in the home, "all details are intimate details, because the entire area is held safe from prying government eyes"). A third line of cases found that liberty includes "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The joint opinion in *Casey* articulated this interest as a "liberty relating to intimate relationships." 505 U.S. at 857; accord, *Roberts v. United States Jaycees*, 468 U.S. 609,

[9] See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 73-81 (1986); Robert Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 Temple L. Rev. 361 (1993).

[10] *Boyd v. United States*, 116 U.S. 616, 630 (1886) (Fourth Amendment); see Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 299-300 (1868) (same idea as a matter of due process).

617-18 (1984) ("choices to enter into and maintain certain intimate human relations" are fundamental to liberty and "our constitutional scheme").

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court invalidated a state law criminalizing the use of contraceptives by married couples in the privacy of their homes. *Griswold* illustrates the various dimensions of liberty protected under the Court's precedents: State conformity requirements are most questionable when they interfere with people's control of their own bodies, disrupt personal relationships, and intrude into the innermost sanctum of the home, the bedroom. The Court relied on *Griswold* to overturn a conviction for viewing obscene materials in the confines of one's own home in *Stanley v. Georgia*, 394 U.S. 557 (1969). The Court expanded *Griswold*'s right to contraceptives for unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and for unmarried minors in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); see *id.* at 711 (Powell, J., concurring) (describing the right as "the constitutionally protected privacy in decisions relating to sexual relations"). In *Moore v. City of East Cleveland*, 431 U.S. 494 (1976), the Court struck down an ordinance making it a crime for unrelated people to live together.

In light of these precedents applying the liberty principle, some state courts ruled that consensual sodomy laws violate the Due Process Clause. E.g., *People v. Onofre*, 415 N.E.2d 947 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981). In *Bowers v. Hardwick*, 478 U.S. 186 (1986), however, this Court found no inconsistency between such laws and the Due Process Clause. *Hardwick* did not resolve issues raised under the Equal Protection or Privileges or Immunities Clauses of the Fourteenth Amendment. *Id.* at 201. This case requires the Court to reconsider this matter in light of the Fourteenth Amendment's core principles and a more sophisticated history of sodomy laws than the Court has seen in previous cases.

II. HISTORY: SODOMY STATUTES HAVE HISTORICALLY FOCUSED ON PREDATORY AND PUBLIC ACTIVITIES; CONSENSUAL "HOMOSEXUAL" ACTIVITIES BECAME THEIR FOCUS ONLY IN THE MID-TWENTIETH CENTURY.

Most accounts urging this Court to revisit *Hardwick* focus on the ways that American public and constitutional norms have evolved. Our focus is on how much sodomy policy, not constitutional principle, has changed—from state regulation of public or coercive sexuality in the nineteenth century to state campaigns to harass and stigmatize gay people. Although not originally inconsistent with Fourteenth Amendment principles, sodomy law's twentieth century intrusion into the private lives and homes of gay people is a regulatory expansion that violates the Constitution.

A. Nineteenth Century Sodomy Laws

In 1868, most state penal codes included the "crime against nature, committed with mankind or with beast." See Appendix 1. Yet sodomy laws as they were then understood and applied were largely consistent with the principles of the Fourteenth Amendment. To be sure, there were potential rule of law problems with such laws, because they did not define precisely what conduct was a "crime against nature," but the statutory terms had well-established common law meanings which supplied the necessary determinacy. Cf. *Wainwright v. Stone,* 414 U.S. 21 (1973). American courts and commentators followed the English decisions defining the crime as involving penetration by a male penis inside the rectum of an animal, a woman or girl, or another man or a boy.[11] Thus, oral sex was not a crime in any American state in 1868, nor

[11] 2 Joseph Chitty, *A Practical Treatise on Criminal Law* *49 (1847); Robert Desty, *A Compendium of American Criminal Law* 143 (1887); John May, *The Law of Crimes* § 210, at 223 (1881).

did any sodomy law before the twentieth century focus on "homosexual sodomy."[12] Likewise, sex between two women was not sodomy, but anal sex between a man and a woman was sodomy.[13] Indeed, the common law recognized sodomy as a crime that could be committed by husband and wife. E.g., Tenn. Comp. Laws part IV, tit. I, ch. 8, § 4843 (1873) (annotation).

If regulation of "homosexual conduct" was not the object of nineteenth century sodomy laws, what was their purpose? Based upon their statutory context, it can be deduced that sodomy laws served two kinds of admissible purposes.[14] One was protection of the community against public indecency. In state codes, sodomy laws were typically listed with crimes against "public morals and decency"—including bigamy and "open and notorious adultery"; printing or distributing obscene literature; public indecency; "lewd and vicious cohabitation" or fornication; blasphemy or cursing in public places; and incest.[15] Except for incest, the other crimes

[12] See William Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 19-52 (1999) (tracing the origins of "homosexuality" as a legal concept in the twentieth century).

[13] Although state laws referred to the crime committed with "mankind" or "man," those terms were universally construed to include unnatural behavior of men with women under authority of *Regina v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1716). See 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1028, at 731 (2d ed. 1859); 2 Chitty, *supra* note 11, at 47-50; Desty, *supra* note 11, at 143; May, *supra* note 11, § 210, at 223. It is possible, but not likely, that New Hampshire's law was limited to male-male conduct. *See* Appendix 1.

[14] Sodomy laws also served purposes that would not be admissible under the Constitution, namely, the instantiation of religious norms through the law, see *Edwards v. Aguillard*, 482 U.S. 578 (1987), and state insistence on rigid gender roles. See *Craig v. Boren*, 429 U.S. 190 (1976).

[15] See Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in *Assessing the Criminal* 39-41 (Randy Barnett & John Hagel III eds. 1977).

involved actions outside the home that could be expected to roil the community. As we shall see (below), proof requirements for sodomy and incest made it unlikely that any of those crimes would be prosecuted if they were consensual within the home.

A second, and in practice the primary, purpose of nineteenth century sodomy laws was protection of children, women, and weaker men against sexual assault. Many codes listed sodomy as one of the "crimes against the person"—rape, carnal knowledge of a girl, assault, mayhem.[16] This suggests that sodomy laws were understood as filling in a regulatory gap as regards nonconsensual sexual activity; an adult male forcing himself anally on a woman, girl, boy, or animal could be prosecuted only under sodomy laws in 1868. All of the model sodomy indictments reproduced in 2 Chitty, *supra* note 11, at 48-50, involved allegations of predation by an older man against a minor girl or boy. Indeed, a man could not be convicted of sodomy based upon the testimony of a sexual partner who was his "accomplice"; conversely, the partner's testimony was admissible if she or he were an unwilling participant or a minor (incapable of giving consent).[17] This well-established proof requirement created an immunity for sodomy within the home between consenting adults.

Appendix 2, listing the reported sodomy decisions from the nineteenth century, demonstrates that sodomy defendants were typically accused of nonconsensual activity. Eliminating the cases where the sex (or indeed the species) of the participants is not disclosed, the reported nineteenth century

[16] Arkansas, California, Georgia, Illinois, Kentucky, Louisiana, New York, and North Carolina most clearly fit the pattern in the text, but other states explicitly linked proof requirements for sodomy and rape. E.g., Ill. Gen. Laws ch. 30, div. V, § 38; Or. Gen. Laws ch. XLVIII, § 216.

[17] See Francis Wharton, *Treatise on the Criminal Law of the United States* 443 (2d ed. 1852); 1 Francis Wharton, *A Treatise on Criminal Law* 512 (8th ed. 1880).

cases fall into three roughly equal groups: (1) sex between adult men and animals; (2) sex between adult men and minors (girls as well as boys); and (3) sex between two adults, almost always involving force or potential status coercion (i.e., high-status man penetrates supervisee or ward). As a matter of both law and practice, consenting adults (male and female or male and male) engaged in sodomy within their own home were immune from prosecution, because there could be no witness to the crime. In *Medis v. State*, 11 S.W. 112 (Tex. Cr. App. 1889), for example, witnesses came upon three men entangled in one another but could not testify that the penis of defendants had penetrated the "victim," and so the court overturned the convictions for lack of evidence. This was the state of affairs in 1868, when the Fourteenth Amendment was adopted: No one would have been on notice that laws making the "crime against nature" illegal would have covered consensual activities between two adults in the sanctity of their home.

B. Expansion of Sodomy Laws, 1879-1969

In 1880, sixty-three prisoners were incarcerated for sodomy in the United States, almost all of them people of color and immigrants.[18] By 1921, hundreds of men were being arrested and imprisoned for the crime each year. This increase was made possible by the establishment of professional police forces in most American cities after the Civil War and by the expansion of sodomy laws beyond their traditional coverage. Whereas no state had defined sodomy to include oral sex before 1879, no fewer than thirty-one had done so by 1923.[19]

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[18] See Jonathan Ned Katz, *Gay American History* 57 (1976) (reprinting Census report).

[19] William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1016-32 (1997).

State and municipal governments were responding to several concerns.[20] The main one was that city-dwellers were alarmed at public displays of indecency and sexual solicitation on their streets and in public restrooms. Thus, cities sought to drive male "fairies" from public spaces, usually through the same vice units that policed female prostitution. Another concern was with the sexuality of children. Although states adopted new laws to protect children against sexual molestation or predation, they also deployed sodomy laws to prosecute sex between men and children; almost half of the reported sodomy cases between 1896 and 1925 involved sex with minors. A final concern was rooted in moral eugenics. Many Americans fervently believed that "degenerate" classes of people were a social disease threatening the body politic. They urged the exclusion, suppression, incarceration, and later the castration and sterilization of "degenerate" classes of people. Moralist Anthony Comstock wrote to one "androgyne" that such "inverts are not fit to live with the rest of mankind. They ought to have branded on their foreheads the word 'Unclean,' and as the lepers of old, they ought to cry 'Unclean! Unclean!' as they go about." Earl Lind, *Autobiography of an Androgyne* 24-25 (1918). Consistent with these new concerns, a quarter of the published sodomy decisions between 1880 and 1925 involved apparently consensual activities between men, but usually in quasi-public places such as restrooms, parks, and bars.

"Homosexuals" became the scapegoats for a more brutal campaign of repression during the McCarthy era. State and national governments invested significant resources in episodic witch hunts to identify "homosexuals" so that they could be arrested and imprisoned, deported or debarred from entering the country, discharged from public employment,

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[20] See Eskridge, *Gaylaw*, *supra* note 12, at 19-49, 374-75.

expelled from the armed services, and exposed by the state as "sex perverts" to their families, employers, and communities.[21] Private oral and anal sex between consenting adults was lumped together with child molestation as a basis for widespread enforcement of sodomy laws against gay and bisexual men. For the first time in American history, large numbers of Americans were incarcerated for long periods of time because they engaged in oral or anal sex with consenting adults. Some were subjected to medical experimentation and torture as well.[22]

The reported cases ballooned. Although most reported convictions were still for sodomy with minors or forcible sodomy, an alarming number were for sodomy between consenting adults in private places. In one case, vice squad officers followed an interracial male couple back to their hotel room. *People v. Earl*, 31 Cal. Rptr. 76 (Dist. Ct. App. 1963). Peeking through a crack in the door, one officer witnessed the men embracing in bed. Assisted by a handhold from his colleague, the other officer looked through the glass transom above the door and observed the men engage in felonious oral sex. The officers broke into the room and arrested the couple. The defendants were convicted of oral copulation and certified as sexual psychopaths. As such, they were committed for indefinite sentences at Atascadero State Hospital. This was no isolated occurrence; other examples of

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[21] See John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (1983); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (1991); William Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 Fla. St. U.L. Rev. 703, 708-66 (1997).

[22] See Eskridge, *Gaylaw*, *supra* note 12, at 354-55 (29 state laws requiring hospitalization of "sexual psychopaths"); Katz, *supra* note 18 (application of such laws to incarcerate and engage in medical experimentation on gay people).

police enforcement of state sodomy laws not only intruded into private spaces, but also entrapped gay men into the crime.[23]

The unprecedented application of sodomy laws to private consensual conduct generated immediate criticism from medical and legal authorities. The American Law Institute ("ALI") joined expert commissions in the United Kingdom, New Jersey, New York, Illinois, California, and other jurisdictions to urge the decriminalization of private sodomy between consenting adults.[24] Their arguments paralleled the principles undergirding the Fourteenth Amendment. The central point of the ALI and expert commission reports was that there was no secular harm from sodomy in private places between consenting adults—and therefore the state should abandon its innovative application of the old laws as inconsistent with the liberty principle. Moreover, because consensual sodomy was so widespread, the episodic state enforcement was at war with the legality and equality principles: The people who went to jail for the crime or were blackmailed tended to be the most vulnerable in society—people of color, closeted "homosexuals," and working class people. Based on these arguments, New York reduced consensual sodomy to a misdemeanor in 1950 N.Y. Laws ch. 525, and Illinois decriminalized it in 1961 Ill. Laws 2044.

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[23] E.g., Dale Jennings, *To Be Accused Is To Be Guilty*, One, Inc., Jan. 1953, at 11-12 (first-person account of police entrapment of "suspected homosexual"); see Eskridge, *1946-1961*, *supra* note 21, at 717-33 (detailed account of police practices designed to flush out "homosexuals" in Florida).

[24] See Eskridge, *1946-1961*, *supra* note 21, at 773-83 (detailed examination of the reports discussed in text). In drafting its Model Penal Code, the ALI voted in 1955 to decriminalize consensual sodomy, because such laws (1) undermined respect for the law by penalizing conduct many people engaged in, (2) regulated private conduct not harmful to others, and (3) were arbitrarily enforced and led to blackmail. ALI, *Model Penal Code*, Commentary 277-80 (Tent. Draft No. 4, 1955).

C. Sodomy Reform and Reformulation, 1969-2002

After the Stonewall riots of 1969, gay people engaged in political activism to protect their lives against police intrusion and to remove legal discriminations against them. They found allies in the legal profession, including the ABA, and the medical profession, which in 1973 resolved that homosexuality is not a mental or psychological defect and therefore was no basis for unequal treatment. Popular support for consensual sodomy laws was also waning. Between 1969 and 1976, eighteen states decriminalized consensual sodomy, consistent with the ALI's Model Penal Code ("MPC").

Although others followed, the 1970s saw a backlash: Arguing that sodomy reform would encourage "unnatural" conduct or "promote" homosexuality, family values activists opposed decriminalization. For example, after Idaho adopted the MPC, legislators accused of "promoting" homosexuality reinstated the outdated criminal code, 1972 Idaho Laws 844, 966-67. According to one senator, "[t]he code was repealed solely as the result of an emotional hysteria generated by some very right-wing church and political groups." See *Idaho Repeals New Consenting Adults Code*, The Advocate, May 10, 1972, at 3.[25] In contrast, when Kansas decriminalized consensual sodomy with someone of the opposite sex, it left same-sex consensual sodomy a misdemeanor. 1969 Kan. Laws ch. 180, § 21-3505. Texas's Homosexual Conduct Law followed the Kansas model, as did new laws in Montana (1973), Kentucky (1974), Missouri (1977), Nevada (1977), and Tennessee (1989). Like Idaho in 1971, Arkansas in 1975 adopted the MPC, which stimulated protests from some religious groups that sodomy decriminalization would

[25] The Moral Majority persuaded the House to veto the District of Columbia's sodomy repeal in 1981, based upon the same arguments. E.g., 127 Cong. Rec. 22,749 (Rep. Bliley), 22,762-63 (Rep. Crane) (1981).

open the state to "homosexuals." Unlike Idaho, Arkansas responded by recriminalizing only same-sex consensual sodomy. 1977 Ark. Acts 2118, 2118-19. The sponsor bragged that this move was "aimed at weirdos and queers who live in a fairyland world and are trying to wre[c]k family life." Petition for Certiorari, at 5, *Limon v. Kansas* (No. 02-583). Two states reached essentially the same legal rule through judicial opinions construing their consensual sodomy laws to be inapplicable to different-sex sodomy. *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986); *Schochet v. State*, 580 A.2d 176 (Md. 1990). Reformulating consensual sodomy laws to apply only to same-sex activities makes the existence of consensual sodomy laws more acceptable to straight people—but without addressing the arbitrary enforcement and libertarian problems with such laws and at a tremendous price of a formal discrimination against gay people.

This Court's opinion in *Hardwick* upheld a general sodomy law against due process attack but contained language focusing on "homosexual sodomy." That language was particularly unfortunate, as it was delivered at a point when judges in all parts of the country were coming to accept the propositions that consensual sodomy laws violate the liberty principle, and that same-sex sodomy laws violate the equality principle. After 1989, state court judges have decisively rejected sodomy laws that discriminate on the basis of sex or sexual orientation, such as the Texas law in the instant appeal. Soon after *Hardwick*, the Kentucky Supreme Court ruled in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992), that its same-sex sodomy law violated the principles of legality, equality, and liberty of its state constitution. Nevada repealed its same-sex sodomy law in 1993, and the courts in other states have decriminalized same-sex sodomy (page 26 *infra*). States that still openly discriminate are Texas, Kansas, part of Missouri, and (by judicial construction) Oklahoma.

III. DOCTRINE: TEXAS'S HOMOSEXUAL CONDUCT LAW VIOLATES THE DUE PROCESS, EQUAL PROTECTION, AND PRIVILEGES OR IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT.

The evolution of state sodomy laws has taken them far away from the principles of the Fourteenth Amendment. The Texas statute at issue in this case may satisfy the notice requirement of the legality principle, but it does so at the cost of seriously violating the equality and liberty principles. The Homosexual Conduct Law is inconsistent with the Equal Protection Clause, as construed in *Evans*. The Court should also find the statute, and others regulating consensual sodomy without regard to the sex of the participants, inconsistent with the Due Process Clause, as construed in this Court's precedents, and with the Privileges or Immunities Clause, as understood by its Framers.

A. The Texas Homosexual Conduct Law Violates the Equal Protection Clause, as Construed in *Romer v. Evans*, For It Targets Gay People as an Outlaw Class Because of Antigay Animus.

Texas concedes that its law makes it a crime for lesbian (female-female) and gay (male-male) couples to engage in the "same act[s]" that straight (male-female) couples can engage in with impunity. Br. in Opp. at 18. Unless rationally justified, this discriminatory treatment violates the equality idea that "the democratic majority [must] accept for themselves and their loved ones what they impose on you and me." *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring); accord, *The Federalist* No. 78, at 470 (Hamilton) (Clinton Rossiter ed., 1961). If the democratic majority finds consensual sodomy distasteful, the Equal Protection Clause requires that they impose penalties for it on themselves as well as upon minorities. Texas has not done that, and for this reason alone the law is invalid.

Evans supports this result. Indeed, the Homosexual Conduct Law seems almost tailor-made to fit the facts (and therefore the holding) of *Evans*. Like the Colorado initiative invalidated in *Evans*, the Texas law in this case singles out gay people for special disability.[26] As in *Evans*, the law's plain meaning and the context of its enactment suggest that it was motivated by antigay prejudice. If the statute's caption (singling out just "Homosexual Conduct" for criminality) is not proof enough, it is confirmed by the context of the law: In the early 1970s, states like Texas, Idaho, and Arkansas realized that consensual sodomy was so widespread that it made sense to decriminalize it, but such proposals were subject to the charge that they would tolerate or even promote "homosexuality." Idaho responded by reinstating its old law, but the more politically expedient course was that taken by Arkansas and Texas, to decriminalize only "heterosexual sodomy." The Arkansas measure targeted "weirdos and queers," and there is no reason to believe that the same motivations were not at work in Texas.

The animus evident on the face of the statute is reinforced by two other features of the Homosexual Conduct Law. "First, the [law] has the peculiar property of imposing a broad and undifferentiated disability on a single named group."

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[26] Texas maintains that its statute does not discriminate on the basis of sexual orientation, for it would apply to "heterosexuals." Br. in Opp. at 12. To deny that a statute whose caption holds out its coverage as limited to "Homosexual Conduct" is aimed at "homosexuals" is remarkable. "Homosexual sodomy" is "the behavior that defines the class." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); accord, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980). Under *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), a statute whose overwhelming application is against one class of people is a statute discriminating against that class (gay people) and on the basis of its identifying trait (homosexuality).

Evans, 517 U.S. at 632.[27] In this regard, the Texas law is worse than the Colorado one. Under the former, gay people can be arrested, jailed (as Lawrence and Garner were for 24 hours), and convicted of a criminal offense. Because most openly gay Texans can be presumed to commit sodomy with persons of the same sex, the Homosexual Conduct Law brands them as presumptive outlaws. Invoking this law, Texas courts hold that calling someone a "homosexual" is slanderous per se; the accusation of criminality is enough to establish damage. See *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980). The presumptive criminal activities of gay people have civil consequences, like those found troubling in *Evans*. Texas and nearby states have invoked the outlaw status of gay people to exclude them from hate crime and employment anti-discrimination laws, see Pet. at 14-16; to discriminate against them in hiring and promotion decisions for state or local employment, e.g., *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981); to deny them custody of or even visitation with their own biological children, e.g., *Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999); and to introduce antigay messages in sex or AIDS education programs, e.g., Tex. Health & Safety Code § 85.007(b)(2). See also *Alston v. State*, 1991 Tex. App. Lexis 2366, *5 n.3 (Sept. 25, 1991) (promiscuity of a minor is a defense to a charge of heterosexual sex with a minor, but not of homosexual sex with a minor).

"Second, [the law's] sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus against the class that it affects." *Evans*, 517 U.S. at 632. Texas justifies the law as "protection of public morality." Br. in Opp. at 14-16. If the state is trying to protect "public morality," isn't it sufficient to criminalize

[27] And this is an "exceptional . . . form of legislation." *Evans*, 517 U.S. at 632. No state adopted a "Homosexual Conduct" sodomy law until 1969.

"Public Lewdness," Tex. Penal Code § 21.07, and "Indecent Exposure," *id.* § 21.08? Why is it necessary to criminalize private conduct that no one will ever see, unless the goal is to stigmatize gay people as outlaws? The Homosexual Conduct Law is excessive. It is also highly underinclusive: Most sodomy that goes on in Texas is between men and women, the class excluded from the criminal law. This is inexplicable, unless its aim is to stigmatize gay people. Indeed, this Court in *Evans* rejected a more cogent public morality argument. Colorado maintained that its initiative was justified as a signal by tolerant Coloradans that, although homosexual conduct was no crime in the state, they did not consider homosexuality a good thing either. Pet. Reply Br. at 15 & nn.24-25, *Evans* (No. 94-1039).[28] But even this tolerant public morality did not save Colorado's initiative, because it "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Evans*, 517 U.S. at 635.

The state's other justifications are worse. Texas maintains that "[h]omosexual conduct cannot lead to a biological reproduction, or occur within or lead to a martial relationship." Br. in Opp. at 18. This underscores the underinclusiveness of the law, for "heterosexual sodomy" cannot lead to reproduction either. And "homosexual sodomy" is frequently the basis for longterm committed gay relationships and families. See note 30 *infra*. The state's final point, that its statute is "consistent with the traditional and historical view that homosexual activity is *malum in se*," Br. in Opp. at 18, is false. As Part II.A of this brief shows, traditional condemnations of sodomy in nineteenth century America did not focus on "homosexual sodomy" and, indeed, did not focus on sodomy between

[28] See also Brief of *Amicus Curiae* Concerned Women for America, Inc. at 8-21, *Evans* (No. 94-1039) (making the same "Public Morality" argument Texas is making in this case).

consenting adults within the home. Far from saving Texas's Homosexual Sodomy Law, tradition condemns it as a pernicious novelty.

B. The Texas Homosexual Conduct Law Violates the Due Process Clause, as It Criminalizes Gay People's Most Private Activities; *Bowers v. Hardwick* Should Be Overruled.

Because it authorizes police intrusion into the home and into the intimate lives of gay people, Texas's Homosexual Conduct Law is also inconsistent with the liberty principle of the Fourteenth Amendment. Although at odds with *Hardwick*, this conclusion is supported by this Court's precedents interpreting the privacy features of the Due Process Clause (Part I.C). This Court has afforded strongest protection in cases where people's personal security, interpersonal relations, and security within the home are most implicated, specifically including (1) sexual relations within marriage (*Griswold*); (2) sexual relations posing risks of pregnancy outside of marriage (*Eisenstadt*, *Carey*); (3) control of one's own body (*Botsford*, *Cruzan*); (4) home use of obscene materials (*Stanley*); and (5) nonnuclear family living arrangements (*Moore*). This Court would not afford protection in cases where those fundamental privacy interests were not at stake, including (6) adultery; (7) incest; (8) forcible sex between adults; and (9) sex between an adult and a minor. This array of the Court's precedents reflects the Framers' liberty principle: People should be left alone by the state unless their conduct has third-party effects unrelated to "nosy preferences" (my preference to make you just like me).

Under that principle, John Lawrence and Tyron Garner's behavior would seem protected because they were doing no one any harm and were acting within the confines of Lawrence's home. In the foregoing array, their conduct fell closest to categories 2-4, as it involved their chosen deployment of their own bodies (*Botsford*) within the privacy of

their own home (*Stanley*), even if outside the context of procreative marriage (*Eisenstadt*). This is the view of constitutional privacy taken in the MPC and by the large majority of state court judges in the last seventeen years. Contrast Lawrence and Garner's secluded conduct, which harmed no one, with that outside the right of privacy (categories 6-9), for these have clearer third-party effects: adultery's violation of marriage vows to a partner; disruption of the family entailed in adultery and incest; and the consent problems with forcible sex and sex between adults and minors.

Hardwick limited the privacy precedents to a narrower principle—a "right to decide whether or not to beget or bear a child" (categories 1-2). This was an incomplete reading of the precedents, for it provided no account of *Botsford* and other cases assuring a right of bodily integrity outside of pregnancy (such as *Cruzan*). Moreover, this Court had extended the right of sexual privacy beyond this limit in *Stanley* (category 4).[29] *Hardwick*'s characterization also failed to account for *Moore* (category 5). Ultimately, the opinion in *Hardwick* had no robust positive theory of this Court's privacy cases and relied upon a defensive theory: The right of privacy should not be extended to "homosexual sodomy," which this Court felt had traditionally been regulated in Anglo-American law and not been left to individual decisionmaking, just like adultery and incest (categories 6-7). According to the Court's opinion, 478 U.S. at 192-94 & nn. 5-7, what Hardwick did—oral sex with a consenting adult in his bedroom—was illegal in thirty-two of the thirty-seven states when the Fourteenth Amendment was ratified.

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[29] *Hardwick* dismissed *Stanley* as a First Amendment case, but *Stanley* presented itself in privacy terms and relied critically on *Griswold* and Fourth Amendment privacy cases for the proposition that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley*, 394 U.S. at 565.

The Court was misinformed. Part II.A of this brief demonstrates that no state in 1868 made oral sex a crime. No state made sex between women a crime. No state code focused only on sex between men. No law and no court decision and no legal treatise invoked the concept of "homosexual sodomy," a term that did not exist in 1868. No reported case in the United States between 1789 and 1868 clearly applied sodomy laws to conduct within the bedroom between consenting adults. *Hardwick* was correct to examine our American traditions of liberty, but was incomplete in its understanding of that history. The fundamental freedoms Americans enjoy have included choices involving the deployment of the body, intimate relationships, and the home. These are freedoms gay Americans enjoyed until the anti-homosexual repression of 1945-1969—an aberration in our history of liberty that this Court should now close forever.

Hardwick also found that the respondent had demonstrated "[n]o connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other." 478 U.S. at 191. Today it is clear that gay people form intimate relationships and households that (like different-sex marriages) are founded on a love that is sexual, self-giving, and nurturing.[30] The Due Process Clause protects families against state interference, including nontraditional families. E.g., *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting); *Moore*, 431 U.S. at 506 (plurality opinion); cf. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1963) (invalidating law prohibiting people

[30] See Philip Blumstein & Pepper Schwartz, *American Couples: Money, Work, Sex* (1983); Susan Johnson, *Staying Power: Long Term Lesbian Couples* (1990); Lawrence Kurdek, *Relationship Outcomes and Their Predictors: Longitudinal Evidence from Heterosexual Married, Gay Cohabiting, and Lesbian Cohabiting Couples*, 60 J. Marr. & Fam. 553 (1998). See also American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoptions by Same-Sex Parents*, 109 Pediatrics 341 (Feb. 2002) (no fewer than one million children have one or two gay parents).

from cohabiting with someone of a different race). Just as it would be constitutionally unthinkable for the state to arrest straight couples practicing contraception in their marital or relational beds, so it must now be recognized as constitutionally impermissible for the state to arrest lesbian and gay couples engaging in sodomy in their relational beds.

Commentators from different perspectives have considered *Hardwick* both an incorrect and unprincipled precedent.[31] There has been no Supreme Court decision upholding a law that has been subjected to such immediate and persistent criticism as *Hardwick*.[32] The dissenting Justices in *Evans* insisted that this recent precedent cannot be reconciled with *Hardwick*. 517 U.S. at 640-42 (Scalia, J., dissenting). They were correct. *Evans*' holding, that the desire "to make [gay people] unequal to everyone else" is not a legitimate state interest that can satisfy rational basis review under the Equal Protection Clause, *id.* at 636 (majority opinion), is inconsistent with *Hardwick*'s holding, that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is a legitimate state interest that can satisfy rational basis review under the Due Process Clause. *Hardwick*, 478 U.S. at 196. One of this Court's precedents must yield, and the Fourteenth Amendment's original principles suggest the answer: *Hardwick* should be overruled.

Stare decisis cannot protect a precedent inconsistent with other precedents of this Court, but even if there were not a conflict between *Hardwick* and *Evans* the former would be

[31] For a small sample of the scholarship criticizing *Hardwick*, see, e.g., Charles Fried, *Order and Law—Arguing the Reagan Revolution* 81-84 (1991); Richard Posner, *Sex and Reason* 341-50 (1992); Anne Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 Yale L.J. 1073 (1988).

[32] This Court's decisions in *Plessy* and *Korematsu* have been widely criticized, but they were not subject to the enormous amount of immediate criticism as *Hardwick*.

vulnerable to reconsideration. This Court has frequently been willing to reconsider its constitutional precedents, *Payne v. Tennessee*, 501 U.S. 808, 828-30 n.1 (1991) (collecting cases), especially when they have subsequently been called into serious question. *Id.* at 828-30. As a matter of prudence, the Court has also considered whether the precedent's central rule "could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society," and "whether the law's growth in the intervening years has left the precedent's central rule a doctrinal anachronism discounted by society." *Casey*, 505 U.S. at 855 (joint opinion). Not only do these additional considerations fail to save *Hardwick*, but they further undermine it.

State courts have been unimpressed with *Hardwick*'s expansive view of the government's police power. Typical is *Powell v. State*, 510 S.E.2d 18 (Ga. 1998), which struck down under the state constitution's protection of liberty the consensual sodomy law that *Hardwick* had upheld. "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Id.* at 24. Examining American traditions of liberty as to personal security, the home, and intimate relationships, other state courts have agreed. See *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250, 261-62 (Tenn. App. 1996) (appeal denied); *State v. Cogshill*, 997 S.W.2d 534 (Mo. App. 1999) (no appeal taken); *Williams v. State*, 1998 Extra Lexis 260 (Balt. Cir. Ct. 1999) (no appeal taken). Only the courts in Kansas, Louisiana, and Texas have followed *Hardwick*.

Majority opinions in this Court have shunned *Hardwick* as a pariah precedent. *Evans*, of course, ignored *Hardwick*. The Chief Justice's opinion in *Washington v. Glucksberg*, 521 U.S. 702, 705-36 (1997), which rejected a general due

process right to die, failed even to cite *Hardwick*, even though the opinion was applying a historical methodology refusing to recognize a broad substantive due process right.[33] Courts all over the world have refused to follow *Hardwick* and have reasoned that fundamental principles of liberty and equality in the modern state are inconsistent with criminalization of private sodomy between consenting adults.[34] No one who is a genuine student of our American traditions of liberty and equality would mourn the passing of consensual sodomy laws. The world has moved on to a more productive deployment of the criminal sanction. This Court ought to do the same. *Hardwick* should be overruled.

C. The Texas Homosexual Conduct Law Violates the Privileges or Immunities Clause.

Hardwick did not address the constitutionality of consensual sodomy laws under the Privileges or Immunities Clause. Although this Court has not developed a robust doctrine in this area, there is a surprisingly strong case for applying the Privileges or Immunities Clause to protect personal liberties. Recall from Part I.C that the Framers of the Constitution of 1789 and the Bill of Rights were keenly

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[33] Five Justices were open to a "constitutionally cognizable interest in controlling the circumstances of his or her imminent death." *Id.* at 736-38 (O'Connor, J.); see *id.* at 738-52 (Stevens, J.), 752-89 (Souter, J.), 789 (Ginsburg, J.), 789-92 (Breyer, J.).

[34] See, e.g., *National Coalition for Gay & Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (Const'l Ct. South Africa, Oct. 9, 1998) (South Africa Constitution bars state from criminalizing consensual "sodomy' and "unnatural acts"); *Modinos v. Cyprus*, 16 Eur. Hum. Rts. Rep. 485 (1993) (consensual sodomy laws are inconsistent with the rules of the European Community); *Norris v. Ireland*, 13 Eur. Hum. Rts. Rep. 186 (1991) (same); *Toonen v. Australia*, U.N. Doc. CCPR/c/50/D/488/1992 (Tasmania's consensual sodomy law violated the privacy protections of the International Covenant on Civil and Political Rights, which the United States has also ratified).

interested in limiting the powers of government: We the People are sovereign; the state has only those powers We have given it; and We have withheld from the state "immunities" (those natural liberties the People retained) and have acquired "privileges" (the rights society has provided in lieu of natural rights). 1 Blackstone, *Commentaries* *129; U.S. Const. IX Am. Justice Washington and, after him, many of the anti-slavery theorists believed that Article IV's Privileges and Immunities Clause protected those rights "which are, in their nature, fundamental; which belong, of right, to citizens of all free governments." *Corfield*, 6 Fed. Cas. at 551. Other theorists read Article IV more narrowly, and *Dred Scott* confirmed their approach.[35]

Whatever the status of anti-slavery jurisprudence before the Civil War, it is today of legal significance because it was the philosophy of the leading Republicans who sponsored the Reconstruction Amendments.[36] Almost all the Republicans

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[35] A number of thoughtful scholars believe the abolitionist understanding was more faithful to the Framers' intent than *Dred Scott* was. E.g., Chester Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1 (1967); Michael Conant, *Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 Emory L.J. 785 (1982).

[36] Anti-slavery thought was the primary influence on the Reconstruction Amendments. See Jacobus tenBroek, *Equal Under Law* 196-97 (1965) (originally published as *The Antislavery Origins of the Fourteenth Amendment*); Curtis, *No State Shall Abridge*, *supra* note 9, at 26-56; David A.J. Richards, *Conscience and the Constitution: History, Theory, and the Law of the Reconstruction Amendments* 217-32 (1993). Although moderate and conservative Republicans, with less connection to the abolition movement, were important to the Reconstruction Amendments, the key ideas for the Reconstruction Amendments—natural rights to be free from state invasions of liberties, rights of "national citizenship," the state's obligation to provide equal protection of the law to all persons—came from anti-slavery jurisprudence. E.g., Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 Yale L.J. 2003, 2003-05

(including "moderates" like Bingham) disagreed with *Dred Scott* root and branch, and most of them believed its narrow interpretation of Article IV was wrong. E.g., Cong. Globe, 39th Cong., 1st Sess. 430 (Rep. Bingham), 475 (Sen. Trumbull), 1833-36 (Rep. Lawrence) (1866); 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson). Within this normative context, the Privileges or Immunities Clause of the Fourteenth Amendment was intended to expand upon *Corfield* and to establish national rights of citizenship. This was the theme of Representative Bingham's presentation of his proposed amendment to the House of Representatives, Cong. Globe, 39th Cong., 1st Sess. 2542 (1866); Senator Howard's introduction of the proposed amendment to the Senate, *id.* at 2765-66; and the few recorded ratification debates, Curtis, *No State Shall Abridge*, *supra* note 9, at 145-51.

Precisely what those national rights of citizenship were to be was a matter left somewhat open-ended, but the Framers of the Fourteenth Amendment repeatedly invoked Blackstone's understanding of traditional liberties, privileges, and immunities. E.g., Cong. Globe, 39th Cong., 1st Sess. 1118-19 (Rep. Wilson), 1832-36 (Rep. Lawrence) (1866). As demonstrated in Part I.C, Blackstone's central theme was that Englishmen enjoyed natural rights to deploy their bodies and inhabit their properties, without state intrusion, so long as they were not themselves intruding upon the natural rights of third parties. These Blackstonian "immunities" would be directly applicable to John Lawrence and Tyron Garner: The state has no business intruding into Lawrence's private property and snooping into their private pursuit of happiness.

Unlike the earlier discussion in this part, this Court's precedents provide little guidance. *The Slaughter-House Cases*, 83 U.S. 36, 75-80 (1873), gave an exceedingly narrow

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(1999); Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 NYU L. Rev. 863, 890. 940 (1986).

reading to the Privileges or Immunities Clause, essentially limiting it to rights to petition the national government and to travel and trade interstate. See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). After 1873, the Court was unresponsive to Privileges or Immunities Clause arguments, and litigants eventually stopped making them. To reverse the court below on the basis of the Privileges or Immunities Clause would require this Court to abrogate the *Slaughter-House* dicta.[37] That would be an appropriate course of action, not only because that dicta are plainly contrary to the original meaning of the Fourteenth Amendment, but also because they ignore the rich connection among the Declaration of Independence and the normative claims of the American Revolution, the Founding era's Constitution and Bill of Rights, and the Reconstruction Amendments.[38]

CONCLUSION

For the foregoing reasons, *amicus curiae* Cato Institute requests that this Court invalidate the Texas Homosexual Conduct Law and reverse the decision of the court below.

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[37] This Court would not have to overrule the holding of *The Slaughter-House Cases* here. The cases involved a challenge to a state-granted monopoly by New Orleans butchers. One could argue that the Court allowed the local law in part because of concerns that a proliferation of butcheries would create public nuisances harming third-party rights.

[38] Kimberly Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 Tex. Rev. L. & Pol'y 1 (1998). As most commentators agree, the *Slaughter-House* dicta are flatly wrong, e.g., Curtis, *No State Shall Abridge*, *supra* note 9; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992); Philip Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last?*," 1972 Wash. U. L.Q. 405, and this includes commentators who have themselves taken a narrow view of the Privileges or Immunities Clause. E.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

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APPENDIX 1

STATE CRIME AGAINST NATURE, SODOMY, AND BUGGERY LAWS, 1868[1]

Penal Code of Alabama tit. I, ch. 5, § 63 (1866) ("Any person who commits the crime against nature, either with mankind, or with any beast . . .'"

Digest of Arkansas Statutes vol. I, ch. 51, part IV, art. IV, § 5 (1858) ("sodomy or buggery")

General Laws of California vol. I, § 1450 (1865) ("The infamous crime against nature, either with man or beast . . .")

Swift's Digest of Laws of Connecticut book V, ch. VII, § 1 (1862) ("carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast . . .")

Revised Statutes of Delaware tit. XX, ch. 131, § 7 (1852) ("crime against nature")

Manual or Digest of Statutory Law of Florida div. IV, tit. I, ch. VII, § 11 (1847) ("buggery, or sodomy with either human being or beast")

Code of Georgia vol. II, part IV, tit. I, div. 4, § 4286 (1867) ("Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman . . .")

General Laws of Illinois art. XX, § 50 (1858) ("infamous crime against nature, either with man or beast")

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[1] We have compiled this list by examining the criminal codes in place for each state in 1868. (We did not examine territorial codes.) See also William Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (1999) (app. A1); Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in *Assessing the Criminal: Restitution, Retribution, and the Legal Process* 35-97 (Randy Barnett & John Hagel III eds. 1977).

General Statutes of Kansas ch. 31, art. VII, § 231 (1868) ("the detestable and abominable crime against nature, committed with mankind or with beast")

Revised Statutes of Kentucky ch. XXVIII, art. IV, § XI (1867) ("sodomy or buggery with man or beast")

Revised Statutes of Louisiana "Crimes & Offences—Offences Against the Person," § 5 (1856) ("the detestable and abominable crime against nature, committed with mankind or beast")

Revised Statutes of Maine tit. XI, ch. 124, § 3 (1857) ("the crime against nature, committed with mankind or with a beast")

Maryland Code art. 30, § 201 (1860) ("crime of sodomy")

General Statutes of Massachusetts part IV, tit. I, ch. 165, § 18 (1860) ("the detestable and abominable crime against nature, either with mankind or with any beast")

Compiled Laws of Michigan vol. II, tit. XXXVIII, ch. CLXXXV, § 16 (1857) ("the detestable and abominable crime against nature, either with mankind or with any beast")

Public Statutes of Minnesota vol. II, ch. 96, § XIII (1859) ("sodomy or the crime against nature, either with mankind or any beast")

Revised Code of Mississippi ch. 64, § LII, art. 238 (1840) ("the detestable and abominable crime against nature, committed with mankind or with a beast")

Revised Statutes of Missouri ch. L, art. VIII, § 7 (1856) ("the detestable and abominable crime against nature, committed with mankind or with beast")

General Statutes of New Hampshire tit. XXIX ("Crimes & Offenses") (1867) did not identify the crime against nature, sodomy, or buggery as a crime, nor did the Revised Statutes published in 1851 or 1843, but the Act of June 19, 1812, § 5, made it a crime if a "man lye with mankind." Cf. Leviticus

20:13. A reader of the New Hampshire criminal code in 1868 would not have known that "lyeing" was a crime, and a reader of the Act of 1812 would not have known exactly what conduct that statute would have penalized.

Digest of Laws of New Jersey "Crimes," § 9 (1868) (Act of April 4, 1846) ("Sodomy or the crime against nature, committed with mankind or beasts")

Revised Statutes of New York vol. II, part IV, ch. 1, tit. 5, § 20 (1867) ("the detestable and abominable crime against nature, committed with mankind or with a beast")

Revised Code of North Carolina ch. 34, § 6 (1855) ("the abominable and detestable crime against nature, with mankind or beast")

Organic and General Laws of Oregon "Criminal Code," ch. XLVIII, § 639 (1866) ("sodomy or the crime against nature, either with mankind or beast")

Pennsylvania, Act of March 31, 1860 ("sodomy or buggery")

Revised Statutes of Rhode Island tit. XXX, ch. 216, § 11 (1857) ("the detestable and abominable crime against nature, either with mankind or any beast")

Revised Statutes of South Carolina part IV, ch. CXXXIII, § 4 (1873) ("the abominable crime of buggery, whether with mankind or with beast")

Compilation of Statutory Laws of Tennessee vol. II, part IV, ch. 8, § 4843 (1858) ("crimes against nature, either with mankind or any beast")

Digest of the Laws of Texas "Criminal Code," tit. XII, § 2033 (1866) ("with mankind or beast, the abominable and detestable crime against nature")

General Statutes of Vermont tit. XXXIV ("Crimes and Punishments") (1863), did not identify the crime against nature, sodomy, or buggery a crime, but the Vermont Supreme Court

held in *State v. LaForrest*, 45 A. 225 (Vt. 1899), that Vermont's adoption of the English common law in 1779 included the law against "buggery."

Code of Virginia vol. II, tit. 54, ch. CXCVI, § 12 (1860) ("buggery, with mankind, or with any brute animal")

Code of West Virginia ch. CXLIX § 12 (1868) ("buggery, with mankind, or with any brute animal")

Revised Statutes of Wisconsin ch. 139, § 15 (1849) ("sodomy, or the crime against nature, with mankind or beast")

APPENDIX 2

REPORTED STATF SODOMY DECISIONS, NINETEENTH CENTURY

Davis v. Maryland, 3 H. & J. 154 (Md. 1810) (defendant allegedly "with force and arms * * * did make an assault * * * beat, wound, and illtreat" a 19 year-old "youth")

Commonwealth v. Thomas, 3 Va. 307 (1812) (defendant convicted for sex with a mare)

Estes v. Carter, 10 Iowa 400 (1860) (slander case; decision does not describe parties or conduct)

State v. Campbell, 29 Tex. 44 (1867) (defendant, a "freedman of color," convicted for sex with a mare)

Fennell v. State, 32 Tex. 378 (1869) (decision does not describe parties or conduct)

Commonwealth v. Snow, 111 Mass. 411 (1873) (defendant convicted for seduction of a "boy")

Frazier v. State, 39 Tex. 390 (1873) (decision does not describe parties or conduct)

Territory v. Mahaffrey, 3 Mont. 112 (1878) (defendant convicted for seduction of a 14 year-old boy)

People v. Williams, 59 Cal. 397 (1881) (defendant convicted for assault, with intent to commit "the infamous crime against nature," on adult man who complained to authorities)

State v. Williams, 34 La. Ann. 87 (1882) (decision does not describe parties or conduct)

Ex parte Bergen, 14 Tex. App. 52 (1883) (habeas corpus case; decision does not describe parties or conduct)

Collins v. State, 73 Ga. 76 (1884) (defendant convicted for sex with an unnamed animal)

McAfee v. State, 17 Tex. Cr. App. 131 (1884) (defendant convicted for sex with a cow)

Cross v. State, 17 Tex. Cr. App. 476 (1885) (defendant convicted for sex with a mare)

Foster v. State, 1 O.C.D. 261 (Ohio Cir. 1886) (three defendants convicted for gang-raping a fourth man)

Lefler v. State, 23 N.E. 154 (Ind. 1889) (decision does not describe parties or conduct)

Medis v. State, 27 Tex. Cr. App. 194 (1889) (two defendants convicted for anal intercourse with a third man; convictions overturned because state witnesses did not corroborate testimony of consenting "accomplice" that there was anal penetration)

State v. Chandontette, 25 P. 438 (Mont. 1890) (decision does not describe parties or conduct)

State v. Frank, 15 S.W. 330 (Mo. 1891) (defendant convicted for sex with a dog)

Mascolo v. Montesanto, 23 A. 714 (Conn. 1891) (contract case involving validity of a contract not to sue on civil action for assault, buggery, communication of a loathesome disease to 12 and 15 year-old children)

People v. Hodgkin, 53 N.W. 794 (Mich. App. 1892) (decision does not describe parties or conduct)

Bradford v. State, 16 So. 107 (Ala. 1893) (defendant convicted for sex with a cow)

Prindle v. State, 21 S.W. 360 (Tex. Cr. App. 1893) (defendant convicted for oral sex with an adolescent boy; conviction overturned because oral sex was not the "crime against nature" under the common law)

State v. Place, 32 P. 736 (Wash. 1893) (defendant convicted for assault with intent to commit sodomy on a moving train)

People v. Moore, 37 P. 510 (Cal. 1894) (defendant convicted for assaulting an adult man; conviction overturned and new trial ordered)

Hodges v. State, 19 S.E. 758 (Ga. 1894) (defendant convicted for sodomy committed on a boy under 14 years old)

Commonwealth v. Dill, 36 N.E. 472 (Mass. 1894) (decision does not describe parties or conduct)

People v. Hickey, 41 P. 1027 (Cal. 1895) (defendant convicted for assaulting an adult man)

Williams v. Commonwealth, 22 S.E. 859 (Va. 1895) (decision does not describe parties or conduct)

Wright v. State, 35 Tex. Cr. App. 367 (1896) (defendant convicted for sex with a mule)

Lewis v. State, 36 Tex. Cr. App. 37 (1896) (defendant convicted for oral and anal sex with a woman)

Honselman v. People, 48 N.E. 305 (Ill. 1897) (defendant convicted for engaging in oral sex with a 14 year-old boy)

People v. Boyle, 48 P. 800 (Cal. 1897) (defendant convicted for oral sex with a minor; conviction overturned)

People v. Wilson, 51 P. 639 (Cal. 1897) (defendant convicted for assault with intent to rape an adult man)

State v. Brown, 139 Mo. 522 (1897) (decision does not describe parties or conduct)

State v. Smith, 38 S.W. 717 (Mo. 1897) (defendant, a police officer, convicted for raping a 16-year-old boy)

Darling v. State, 47 S.W. 1005 (Tex. Cr. 1898) (decision does not describe parties or conduct)

Hawaii v. Edwards, 11 Haw. 571 (1898), 12 Haw. 55 (1899) (decisions do not describe parties or conduct)

Hawaii v. Luning, 11 Haw. 390 (1899) (decision does not describe parties or conduct)

State v. Romans, 57 P. 819 (Wash. 1899) (defendant convicted for attempted rape of an adult man)

State v. La Forrest, 45 A. 225 (Vt. 1899) (decision does not describe parties or conduct)

State v. Vicknair, 28 So. 273 (La. 1900) (defendant convicted for sex with a 14 year-old boy)

In re King, 82 N.W. 423 (N.D. 1900) (decision does not describe parties or conduct)

Kelly v. People, 61 N.E. 425 (Ill. 1901) (defendant convicted for oral sex with a 6 year-old boy)

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER

Petitioners,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

BRIEF OF *AMICI CURIAE* REPUBLICAN UNITY COALITION AND THE HONORABLE ALAN K. SIMPSON IN SUPPORT OF PETITIONERS

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IN THE

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JOHN GEDDES LAWRENCE AND TYRON GARNER

Petitioners,

v.

TEXAS,

Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

INTEREST OF *AMICI CURIAE*[1]

The Republican Unity Coalition ("RUC") is a national organization of conservative Republicans committed to making sexual orientation a "non-issue" within the Republican Party and throughout the Nation. The Co-Chairmen of the RUC are Charles C. Francis and Donald Capoccia. As described in its credo, the Cody Statement, the RUC believes in limited government, free markets, a strong national defense, personal responsibility, and tolerance of diversity. Formed in 2000, the RUC raises money for and educates Republican candidates for public office who share its vision of a nation committed to legal equality for all, regardless of sexual orientation.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

The RUC's interest in this litigation is simple: It wants gay Americans to be treated like all other Americans who contribute to the richness and diversity of this Nation. This case is an opportunity to confirm that the constitutional command of equal protection requires that gays be treated as equal to all other citizens under the law, subject to neither special preferences nor special disabilities. Such equality reaffirms the Nation's highest traditions without sacrificing the basic moral principles that make our country good as well as great. This case is about neither special entitlement nor the expansion of substantive rights, but rather it is about the unabashedly conservative commitment to our society's truly fundamental values of equality and inclusion, as enshrined in the Constitution. Guaranteeing all citizens – gay or straight – equal rights and responsibilities under the law is the surest way of fulfilling this Nation's deep moral commitment to equality and of giving all Americans a stake in preserving the health and stability of our society.

The Honorable Alan K. Simpson, United States Senator (Ret., R-Wyo.), served 18 years in the United States Senate before retiring in 1997. He currently serves as Honorary Chairman of the RUC. Senator Simpson graduated from the University of Wyoming Law School, served as the assistant to the attorney general of Wyoming, served 13 years in the Wyoming House of Representatives and was director of Harvard University's Kennedy School of Government. Senator Simpson's interest in this litigation is that he supports the principle of equality under the law, regardless of an individual's sexual orientation.

STATEMENT

Acting on a false report of a "weapons disturbance" filed by a malicious neighbor, sheriff's officers entered the home of petitioner Lawrence and interrupted petitioners having sex. Because both petitioners were male, they were charged with

the offense of Homosexual Conduct as proscribed by the Texas Penal Code § 21.06.[2]

Petitioners were convicted and their motions raising constitutional privacy and equal protection challenges to the Homosexual Conduct law were rejected. A panel of the Court of Appeals reversed on the ground that the law violated the Texas Equal Rights Amendment. Pet. App. 86a-92a. The *en banc* Court of Appeals, however, reinstated the convictions, rejecting all of petitioners' arguments, including their privacy and equal protection challenges under the Federal Constitution.

The *en banc* Court of Appeals disposed of petitioners' privacy challenge by citing *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). Pet. App. 24a-31a. Regarding the equal protection challenge, the Court of Appeals viewed the statute as applying to homosexual "conduct" rather than "orientation," and held that it survived rational-basis review because it "advances a legitimate state interest, namely, preserving public morals." Pet. App. 13a.

The Texas Court of Criminal Appeals declined to review the case and this Court thereafter granted certiorari.

SUMMARY OF ARGUMENT

This *amicus* brief addresses only the first question presented by the petition for certiorari: Whether petitioners' convictions under the Texas Homosexual Conduct law "violate the Fourteenth Amendment guarantee of equal protection of the laws?" Under the circumstances of this case, the

---

[2] That section makes it unlawful for a person to engage "in deviate sexual intercourse with another individual of the same sex." Tex. Pen. Code Ann. § 21.06 (Vernon 1994). "Deviate sexual intercourse" is defined in Texas as "any contact between any part of the genitals of one person and the mouth or anus of another person; or * * * the penetration of the genitals or the anus of another person with an object." Tex. Pen. Code Ann. § 21.01 (Vernon 1994).

State's asserted interest in public morality is insufficient to deny one class of citizens (gay persons), but not others similarly situated, a life of physical affection and intimacy.[3]

One of the most important and least appreciated functions of the Fourteenth Amendment's Equal Protection Clause is to provide a structural check against the majority oppressing those with whom the majority disagrees. The Framers were acutely concerned with the threat of such oppression by majority "factions" and sought to mitigate that threat by encouraging a diversity of smaller and competing political interests or factions that would make it difficult to form an oppressive political majority. That solution was incomplete, however, and the Equal Protection Clause later provided a textual complement to the competition of factions by requiring that all legislation apply equally to the majority and to the minority. The Constitution ties the fates of minorities and majorities together, preventing selective oppression. The structural check of equal protection thus safeguards all political minorities – and thus all citizens – without regard to whether they are in a suspect class or are merely on the unsuccessful side of a particular political debate.

Under even the most basic level of equal protection scrutiny, Texas's Homosexual Conduct law lacks a rational relation to a legitimate legislative end. While preserving public morality, in general, is a legitimate state interest ordinarily sufficient to withstand rational-basis scrutiny, stand-alone moral claims uncoupled from other policy interests are insufficient bases for legislative classifications if they are accompanied by substantial indicia of animus against a class of persons. Such substantial indicia of animus can be found in the structure and history of the legislative classification itself, the

[3] This brief uses the word "gay" to describe persons whose emotional and sexual attraction is to members of the same sex. Similarly, this brief uses the word "straight" to describe persons whose emotional and sexual attraction is to members of the opposite sex.

consistency of application of the asserted moral interest, and the practical operation and ramifications of the law. Because animus against a class is an invidious and impermissible basis for legislative classification, such animus will offset or negate the weight of otherwise potentially valid moral claims and require the State to provide a basis for classification beyond its own non-falsifiable assertions of moral interest. Bare assertions of morality, without more, simply cannot overcome the constitutional infirmity of basing legislative classifications on group animus.

In this case, the statute's inconsistent treatment of identical physical acts by gay and straight couples, combined with its context and history, provide ample indicia of animus toward gays as a class, and thus render insufficient the State's asserted moral interests for purposes of rational-basis review.

First, same-sex-only prohibitions on particular sexual conduct are a recent and novel innovation, well divorced from the traditional moral and legal condemnation of such conduct regardless of the relative sex of the couple involved. By taking the uniform historical prohibitions on sodomy and abolishing them for all but the small political minority of gay couples, Texas betrays an animus toward gay couples rather than a concern for preserving "traditional" morality.

Second, the advancement of positive knowledge regarding homosexuality, and the abandonment of debunked policy arguments used against homosexuals, suggest that Texas's lingering moral claims may simply mask vestigial prejudice based on old stereotypes and myths. Texas offers none of the old canards about homosexuality, nor any new harms-based justifications, in support of its law. The State's retreat to a non-falsifiable and fundamentally circular assertion of a moral interest in the law as passed is another indication of animus.

Third, the selective and inconsistent application of traditionally uniform sexual morality indicates animus toward the

narrow class of gay persons. At the same time Texas targeted gay couples under its Homosexual Conduct law, it decriminalized sodomy between opposite-sex couples and decriminalized bestiality. While Texas need not address all of its moral concerns at once, when it forbids lesser offenses to its claimed morality while revoking restrictions on equal or patently greater moral offenses, that provides another indication of animus as the determining factor in how it now selectively applies its traditionally uniform morality.

Fourth, infrequent prosecution suggests a minor concern at best with the morality of the *conduct* at issue. The few instances of enforcement are utterly random or, worse yet as in this case, the result of personal vindictiveness. The primary practical use of the statute, however, seems to be as a basis for discrimination against gays in unrelated contexts. The infrequency of the direct enforcement of the law against specific conduct combined with its invocation to deny gays equal treatment in areas unrelated to the prohibited conduct reflect animus toward gays as a class.

Fifth, the broad ramifications of the law and the fundamental deprivations suffered by it targets, combined with its narrow focus on a single class of citizens, stand as indicia of a pervading animus toward gays as a class rather than merely a straight-forward concern for preserving traditional sexual morality.

With so many indicia of animus toward gays as a class, Texas must offer some further and more readily tested interest beyond its non-falsifiable assertions of morality. While morality alone can indeed be a legitimate interest, when assertions of moral interests are coupled with substantial indications of animus against a class of persons such assertions cannot by themselves sustain the constitutionality of a legislative classification. Because Texas can offer no such further legitimate justifications for its law, the Homosexual Conduct law violates the Equal Protection Clause.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE IS A STRUCTURAL CHECK ON LEGISLATION BY MAJORITY FACTIONS.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause has long been correctly understood to protect politically vulnerable groups from governmental discrimination and to preclude certain personal traits from being legitimate bases for legislative classifications. *See, e.g.*, *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989) (race); *Reed* v. *Reed*, 404 U.S. 71 (1971) (sex); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938) (discrete and insular minorities). But it also serves the purpose of checking oppressive laws in general by requiring that the burdens the majority impose on a minority it must also impose on itself.

A. The Structural Function of the Equal Protection Clause.

The Framers of our Constitution recognized the danger of majority "factions" imposing unjust and discriminatory laws. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 54-55 (Van Doren ed., Easton Press Edition 1979). Madison correctly recognized that "the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 58 (emphasis in original). One means of countering those effects is to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 59. The "greater security" is to be found in a "greater variety of par-

ties, against the event of any one party being able to outnumber and oppress the rest." *Id.* at 62.

Acting as a textual complement to Madison's "republican remedy" of having a "variety of parties," *id.*, the Equal Protection Clause plays a significant role in checking "schemes of oppression" by any majority faction. In its more general role of ensuring that all legislative classifications apply broadly and equally, the Clause thus implements the overall constitutional scheme of limited government and structural checks and balances. As Justice Jackson so aptly noted more than a half-century ago:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express Agency v. *New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). That structural approach to constraining majority factions safeguards the liberty of *all* persons, not merely of selected groups or minorities.

Many of the current members of this Court have, in a wide variety of contexts, recognized the wisdom of Justice Jackson's views. *See, e.g.*, *Hill* v. *Colorado*, 530 U.S. 703, 731 (2000) (Stevens, J., joined by Rehnquist, C.J, and O'Connor, Souter, Ginsburg, and Breyer, JJ.) ("Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory gov-

ernmental motive.") (citing and quoting Jackson concurrence); *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., joined by O'Connor and Souter, JJ., concurring) ("the uniform general treatment of similarly situated persons * * * is the essence of law itself") (citing and quoting Jackson concurrence); *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764-65 (1994) (Rehnquist, C.J., joined by Blackmun, O'Connor, Souter, and Ginsburg, JJ.) (citing and quoting Jackson concurrence).

Justice Jackson's vision of the checking function of equal protection is especially important where the Constitution lacks any categorical restriction on the particular substance of a law. As Justice Scalia has recognized in the context of rejecting a constitutional right to die, the absence of a substantive due process right in any particular area does not leave us wholly vulnerable to oppressive laws. "Our salvation [from oppressive laws not categorically prohibited by the Constitution] is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

Justice O'Connor has made the related point, in a subsequent right-to-die case, that we can have most faith in the fairness of the democratic process where we will all be similarly affected by the legislative product of that process. *Washington* v. *Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring) ("Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between" the competing interests at stake regarding assisted suicide). But the corollary to such faith in the process when "[e]very one of us" will face the consequences is a severe skepticism when the burden of the law is wildly unequal and when the vast majority of the pub-

lic is intentionally immunized from the restrictions imposed upon a minority.[4]

In order to fulfill the structural function of the Equal Protection Clause, courts must keep a vigilant watch for laws that restrict the liberty of only a narrow class of persons, thereby escaping the natural political checks arising from the broad and equal application of legislative burdens. Such laws undermine our faith in the political process that begat them and are less likely and less quickly remedied because they are insulated from the balanced operation of that process as envisioned by the Framers of the Constitution and the Fourteenth Amendment.

B. Meaningful Rational-Basis Review

Having the structural role of the Equal Protection Clause firmly in mind, we can turn to the baseline rational-basis test with the recognition that it is more than a rubber stamp on legislative conduct. Though facially similar to the rational-basis test applied under "substantive" due process, "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'" *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), and hence the legitimacy and scope of judicial inquiry into unfair classifications are more firmly grounded than in the due process context.[5]

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[4] *See Minneapolis Star and Tribune Co.* v. *Minnesota Comm'nr of Revenue*, 460 U.S. 575, 585 (1983) (per O'Connor, J.) (recognizing the political constraints imposed by equal application of burdensome laws: "We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. *See* [Jackson concurrence]. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute.")

[5] In *Bowers* the parties did not raise, and this Court therefore did not address, any Equal Protection Clause challenge or the ways in which equal protection analysis would differ from substantive due process analysis. 478 U.S. at 196 n. 8.

Under the Equal Protection Clause, this Court can and does engage in meaningful inquiry into the legitimacy of the ends to be accomplished and the means by which a particular classification is claimed to serve those ends. As it is typically described, the rational-basis test requires that all legislative classifications "bear[] a rational relation to some legitimate end." *Romer* v. *Evans*, 517 U.S. 620, 631 (1996) (*citing Heller* v. *Doe*, 509 U.S. 312, 319-320 (1993)). A classification may not be drawn "on the basis of criteria wholly unrelated to the objective" of a statute, but rather "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed*, 404 U.S. at 75-76 (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)).

Regarding the ends sought by legislation, this Court has repeatedly confirmed that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare * * * desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Department of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973). The desire to disadvantage a class of persons is constitutionally impermissible animus. *Romer*, 517 U.S. at 634-35. Such animus, when reflected in a legislative classification devoid of any testable connection between means and ends, is fatal to the classification's constitutionality.

Finally, in order that the equal protection guarantee be fully realized, this Court and others have not only the right, but the obligation, to engage in the *substantive* analysis inherent in the concepts of equality, rationality, and arbitrariness. Unlike in the due process context, where substantive limits are inferred from sources other than the text of the Due Process Clause itself, the Equal Protection Clause contains an express textual command that persons be treated "equal[ly]" by the law. "Equality" is necessarily a substantive concept in

itself and requires subsidiary substantive judgments as to whether any purported differences in persons are in fact sufficiently substantial and valid as to support otherwise unequal treatment. Far from being on uncertain ground in making a substantive evaluation of a state's purported interests and distinctions, the Court is on textual bedrock when it enforces the Equal Protection Clause. The Court is not "discover[ing]" any "new" rights, *Bowers*, 478 U.S. at 194, but rather applying well-supported requirements of equality to novel legislative classifications. Applying the Constitution's command of "equal protection of the laws" is thus well rooted in the Constitution's "language" and "design," founded upon "express constitutional authority," and threatens this Court with neither "vulnerability" nor "illegitimacy." *Id.* at 194-95.

That the constitutional command of equal protection inevitably requires the politically independent judiciary to make some substantive determinations that run contrary to the judgment of the politically responsive branches of government is not a flaw, but a virtue. It is the very purpose of the federal judiciary in such instances to check the legislature's act by enforcing the higher constitutional command. As this Court noted with regard to the First Amendment, the very purpose of *constitutional* limits on government "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943). Equal protection of the laws, no less than the "right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights[,] may not be submitted to vote; [it] depend[s] on the outcome of no elections." *Id.*

II. THE ASSERTED PUBLIC-MORALITY INTEREST IN THIS CASE DOES NOT SATISFY RATIONAL-BASIS REVIEW.

The statute at issue in this case traces its origins to 1860, when Article 342 of the Texas Penal Code outlawed "the abominable and detestable crime against nature" committed with "mankind or beast." 1860 TEX. CRIM. STAT. art. 342. The law applied to both straight and gay couples, *Lewis* v. *State*, 35 S.W. 372 (Tex. Ct. Crim. App. 1896) ("Woman is included under the term 'mankind'"), and to anyone engaging in interspecies sexual behavior.[6] In 1943, the law was amended to prohibit oral sex, but still continued to apply to straight and gay couples and to bestiality. 1943 Tex. Sess. Law Serv. Ch. 112, § 1 (Vernon).

Prior to 1973, therefore, the hallmark of Texas law had been a uniform prohibition of particular *acts*, regardless of the relative sex of the participants. Sodomy, as it was popularly known, was forbidden to all couples. In 1973, however, Texas abandoned its uniform proscription of sodomy, and simultaneously decriminalized bestiality as well. *Donoho* v. *State*, 643 S.W.2d 698, 699 (Tex. Ct. Crim. App. 1982). But just as it had abandoned its legislative interest in private sexual conduct in general, the legislature created a new category of "deviate sexual conduct" that could be performed by all couples regardless of their relative sex, but then proscribed such conduct uniquely for the class of same-sex couples. 1973 Tex. Gen. Laws ch. 399, § 1.

As things currently stand, therefore, the State of Texas has abandoned its traditional moral objection to particular sex acts – so long as they are performed on a member of the opposite

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[6] For many years, however, the Texas Supreme Court held that the statute was too vague to state an offense. *See, e.g., Frazier* v. *State*, 39 Tex. 390 (1873) ("there is no such offense known to our law as the one charged in the indictment"). It was not until 1883 that the law was held sufficiently clear in light of the common law to be enforceable. *Ex parte Bergen*, 14 Tex. App. 52 (Tex. Ct. App. 1883).

sex or on animals. In its place Texas offers up the recently fashioned "moral" objection to homosexual conduct alone and draws no distinction between such conduct and the identical conduct by heterosexual couples other than the raw assertion that one is immoral while the other is not.

A. Moral Claims Standing Alone Are Insufficient State Interests When There Exist Substantial Indicia of Animus Against a Class of Persons.

It is rare to find moral claims offered as the sole justification for public laws. While morals undoubtedly inform many of our laws, they also routinely coincide with harm-based public policy concerns such as health, safety, and protecting the rights of third parties. Even where laws might be considered solely a reflection or promotion of morals – indecent exposure prohibitions, for example – they typically involve some element of offensive *public* conduct that triggers a proper interest by public authorities. The routine coincidence of moral proscriptions with public policy concerns helps explain why this Court generally recognizes in the same breath the government's presumptive authority to regulate and promote the "public health, safety, and morals." *See, e.g.*, *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

In those few instances, however, where moral claims in support of legislation are completely divorced from harm-based justifications, somewhat greater caution is warranted in determining whether such claims form a legitimate and sufficient basis for legislative classifications. While even bare moral claims are presumptively sufficient under rational-basis scrutiny, that presumption can and should be overcome if there are substantial indicia of invidious animus against a class as a significant driving force behind the classification under review.

Faced with such indicia of animus arising from the history, context, and structure of the law at issue, this Court should require more from the State than a non-falsifiable and

often circular assertion that morality alone is the basis of the classification. Such moral assertions, even though presumptively valid in themselves, generally escape judicial review as to their substance. If the constitutional guarantee of equal protection is to be more than a hollow promise, cancelable upon the mere assertion of a moral interest, it must provide judicial review where substantial indicia of animus are present. Coupled with impermissible group animus, and unsupported by judicially reviewable policy claims, even valid moral considerations are offset or negated by the simultaneous presence of unconstitutional animus underlying the law.

B. The History, Context, and Structure of the Homosexual Conduct Law Indicate Animus Against Gays as a Class.

In this case, Texas law on its face raises the grave suspicion that animus toward gays as a class, rather than the asserted moral concerns alone, animates the discriminatory classification. Unlike the prohibition at issue in *Bowers*, which at least facially applied with equal force to sodomy performed by straight and gay couples alike, Texas law applies only to gay couples. The State thus asserts no official interest in the actual sexual *conduct* involved in this case. Texas does not seek to protect any consenting adults from participating in the defined sexual acts, but rather seeks to control – and thus classifies based upon – the *identities* of the persons involved.[7] The objection here is to gay couples *per*

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[7] To say that it is conduct *by particular persons* that is objectionable – thus conflating the issues of conduct and identity – is no answer because it would effectively insulate the law from equal protection analysis and leave only substantive due process analysis in its place. A law forbidding red-heads from driving cars would thus be aimed at the narrowly defined conduct of "red-headed driving" rather than discriminate against red-heads with regard to the general conduct of driving. The only check would then be whether the goal of banning red-headed driving is permissible under the Due Process Clause. That simply drains all meaning from equal protection.

se given that the identical conduct is permissible for straight couples. *That* objection indicates animus toward gays as a class of persons rather than a mere moral objection to particular acts of homosexual intimacy.[8]

Texas argues that it is entitled to treat gays differently because homosexual conduct is immoral even where the identical heterosexual conduct is permissible. Texas offers nothing more than its own assertion that the relative sex of consenting adult couples is morally significant in the context of identical sex acts. That non-falsifiable assertion, however, flies in the face of history and tradition – which made no such distinction – and thus ought to be weighed with skepticism. Here both the history and the structure of the Texas law, as well as the context and practical consequences of that law, provide substantial indicia that animus against a class is at work. Texas's bare assertion of narrow and ahistorical moral concerns, while perhaps sufficient in isolation to support legislative classifications, is necessarily insufficient when coupled with such offsetting and invidious animus.

Same-Sex-Only Prohibitions Flout History. One indication of group animus in relation to moral claims is the ahistorical imposition of a traditionally uniform moral precept on only a narrow group. The decision to enforce the traditional morality against only a single class, when unrelated to harm-based policy justifications, suggests that the now-partial application of the rule inevitably has more to do with the class

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[8] There is no need to join any debate over what constitutes homosexuality versus bisexuality versus anything else. What matters for the purposes of Texas law is not how a person would self-identify or how some researcher would categorize the person, but rather the irreducible fact that the persons overwhelmingly disadvantaged by the law are those who are sexually attracted to members of the same sex. Whether such attraction is consistent and exclusive, opportunistic, or extremely limited and experimental is irrelevant. The law burdens those with homosexual inclinations of whatever frequency and leaves untouched persons with exclusively heterosexual inclinations.

singled out for continued restriction than it does with the traditional moral position itself. The history of sodomy laws in Texas and elsewhere demonstrates that same-sex-only restrictions are novel innovations contrary to the long-established tradition of sodomy prohibitions making no distinction based on the relative sex of the participants.

When the Fourteenth Amendment was ratified in 1868, of the 37 states with laws against sodomy, all but three forbade the conduct for *all* couples, regardless of their relative sex. Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 YALE L.J. 1073, 1082-84 (1998). The three outliers targeted only male-male couples, and had no restrictions on female-female couples. None of the states, therefore, had any objection to homosexual conduct as a category unto itself. It was not until 1969 that Kansas became the first state to adopt a law targeted at homosexuals as a class. William N. Eskridge, Jr., GAYLAW 330 (1999); *see also* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 103, 111 (2000) ("The interpretation of sodomy laws has evolved over time from strictures that applied to all people to edicts that apply exclusively to gay men and lesbians. As of the mid-1960s, all sodomy laws in the United States facially applied equally to both heterosexual and homosexual sodomy. No state had yet passed any law applicable only to same-sex conduct.") (footnotes omitted). The asserted moral objection to homosexual sodomy *alone* was thus unknown to the Framers of the Constitution and of the Fourteenth Amendment.

In contrast to the material relied upon in *Bowers* suggesting that proscriptions against *sodomy in general* have "ancient roots," 478 U.S. at 192, proscriptions limited to homosexual conduct are novel and largely rootless developments of the modern era. Even today, only four states have laws targeted at same-sex conduct. Pet. 4 (identifying same-sex-only laws or judicial constructions of laws in Texas, Kansas, Missouri,

and Oklahoma). Traditional morality drew no such fine distinctions and condemned sodomy for all persons regardless of the sex of their partners. Whether or not such traditional morality was sensible, it was at least fairly equal and consistent as implemented historically by law. Texas law is instead a novelty, abandoning both the relative equality and consistency of traditional sexual morality.

Texas thus offers a novel moral regime whereby conduct once condemned is now acceptable, but only for the political majority, while the identical conduct is prohibited for the political minority.[9] That change in position indicates the use of raw and self-serving political power to impose restrictions on a disfavored group that the majority is unwilling to impose upon itself. It is thus the very sort of class-based legislation that exemplifies the danger of majority factions, that undermines our confidence in the political processes that produced it and sustains it, and that raises concern under the Equal Protection Clause regardless whether suspect classes or fundamental rights are involved. Even where moral concerns might also be asserted, the use of such majority-faction power in the service of animus toward a narrow class fails the rational-basis test and violates the Constitution.

Abandoned Policy Justifications Caution Against Animus Hiding Behind Lingering Moral Claims. One of the more telling suggestions of animus by those seeking to selectively burden gays is the shift to non-falsifiable arguments after previous justifications have been debunked or delegitimized over time. With the advance of positive knowledge

[9] The demise of generally applicable sodomy laws is a useful example of how the majority protects the liberty of the minority when the two groups' rights are tied together by an equally applicable law. Restrictions that the majority will not tolerate for itself are repealed for all. Same-sex-only prohibitions, by contrast, are harder to dislodge because the majority has no interest in repealing them, having obtained for itself the freedom to engage in the formerly proscribed sexual conduct. The minority is left to fend for itself, and predictably has a harder time doing so.

about homosexuality, the claims of direct public harm have fallen by the wayside. Nothing now remains but a self-contained "moral" claim against homosexuality selectively edited from the broader historical condemnation of sodomy in general.

In the recent past, objections to homosexuality have been based on a variety of harm-based claims thought to justify regulation. For example, those seeking to restrict or punish homosexuals have variously asserted that it is a sickness, that it is chosen or changeable, and that its incidence varies with the degree of tolerance or repression in a legal regime. Richard A. Posner, SEX AND REASON 224 (1992); Ernest van den Haag, *Notes on Homosexuality and Its Cultural Setting*, *in* THE PROBLEM OF HOMOSEXUALITY IN MODERN SOCIETY 296-300 (Hendrik M. Ruitenback ed., 1963). Homosexuals also were tarred with being generally lacking in morals and more likely to force themselves on unwilling partners and children. van den Haag, *Notes on Homosexuality* at 295; Joseph S. Jackson, *Persons of Equal Worth:* Romer *v.* Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 459-60 (1997). These claims were then used to justify measures to deter homosexuality, to get existing homosexuals to change their orientation, and to protect straight persons and children from being lured into homosexuality the way they might be lured into some vice.

As positive knowledge about homosexuality improved, such myths were debunked and fact has replaced fiction and prejudice regarding gays. *See, e.g.*, Posner, SEX AND REASON at 297-307 (rehearsing evidence and lack thereof regarding promotion, encouragement, and suppression of homosexuality); van den Haag, *Notes on Homosexuality* at 291-300 (homosexuality not a sickness or disease, not related to theft, swindle, or rape, and not suppressed by legal restriction). Indeed, even Texas no longer pretends that there is any material harm to homosexual conduct or that its law can alter the inci-

dence of homosexuality, but instead asserts only a moral interest conveniently immune from empirical falsification.

Regardless whether such a moral claim could stand in isolation to support legislation, it is certainly *not* in isolation here. Rather, the collapse of excuse after excuse for discriminating against gays and the late-coming manufacture of a novel, selective, and non-falsifiable moral claim serves as the backdrop for equal protection analysis. That backdrop strongly indicates a lingering animus likely born of the falsified substantive libels against gays. Such animus stands as a foil and an offset to *ad hoc* "moral" justifications.

Underinclusion as to Greater Offenses to Traditional Sexual Morality Indicates Animus. At the time Texas abandoned its general prohibition on private consensual sodomy and adopted its Homosexual Conduct law it also eliminated penalties for private bestiality. *Donoho*, 643 S.W.2d at 699 ("Deviate sexual intercourse, though a more modern term, describes conduct that was formerly denounced by statute in this State as sodomy – omitting now, however, bestiality."). As Texas law now stands, a person can legally have sex with an animal but not with a committed partner of the same sex.

But crossing the species line is at least as great an offense to traditional sexual morality as reflected in the law as is remaining on the same side of the gender line. One need not take issue with traditional sexual morality to recognize that the decision to selectively enforce such morality in such a backwards manner reflects a deep animus against gays as a class. Indeed, the selectivity of Texas law fairly screams animus. A Texan may have sex in private with an animal or an opposite-sex partner he met ten minutes ago, and the law will take no heed. But let a Texan have sex with even a committed same-sex human partner, and the criminal law cries foul. Whatever morality Texas purports to protect with that regime, it is not *traditional* sexual morality.

The message sent by the patchwork of Texas sex laws is that gay citizens are less worthy of a life of physical intimacy than are animals and those who molest them. If that is not an expression of animus against a class of persons, nothing is.

Infrequent Prosecution and Secondary Discrimination Suggest Animus and a Lack of Significant Moral Concern. In Texas, as under sodomy laws elsewhere, prosecutions for violation of the Homosexual Conduct law are rare. *Baker* v. *Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982) (sodomy law "not enforced by criminal prosecutions"), *rev'd*, 769 F.2d 289 (CA5 1985) (*en banc*), *cert. denied*, 478 U.S. 1022 (1986); *see also Bowers*, 478 U.S. at 198 n. 2 (Powell, J., concurring) ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.").

While the absence of substantial enforcement does not eliminate the law's adverse impact on gays, it does cast considerable doubt on the significance of any moral assertions in support of it.[10] Were Texas materially concerned with the morality of private consensual behavior among same-sex couples, presumably it would make an actual effort to stop or deter such conduct. That it makes no affirmative effort to enforce its law thus demonstrates that, at best, its moral concerns with the conduct itself are *de minimis*. Instead, the pri-

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[10] Justice Scalia has suggested that non-enforcement or repeal of sodomy laws reflects only a practical concern with the costs of enforcement but does not negate the genuineness of the claimed moral concern. *See Romer*, 517 U.S. at 645 (Scalia, J., dissenting). But the resources needed to actually enforce a law against homosexuality are nowhere near as burdensome as Justice Scalia implies – it would not be hard to identify gay couples in cities with gay bars and neighborhoods, or to obtain probable cause to believe they had engaged in sexual relations. And insofar as enforcement of the asserted morality might be "unseemly," "offensive," "wasteful," or "demeaning" to police and law enforcement as an institution, *id.*, that speaks volumes about the strength of the government's interest and such thin claims ought not be sufficient to differentiate between identical conduct for gay and straight couples when animus is present.

mary impact of laws targeting homosexual conduct is to act as an excuse for discrimination against gays in other contexts having nothing to do with their private intimate behavior. That is, the real-world function of the law is to target gays as a class, not to proscribe what the State asserts is morally objectionable behavior.

The existence of sodomy laws is often used to justify denials of equality to gays in a host of other areas, such as public and private employment, child custody, adoption, foster care, and other areas. Leslie, 35 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. at 104 ("Public agencies, private actors, and courts all rely on the criminality of sodomy to justify discrimination against gay and lesbian Americans. Sodomy laws are used to facilitate employment discrimination, bias against gay and lesbian parents in custody disputes, discrimination against gay organizations, discriminatory enforcement of solicitation statutes, and immigration discrimination."). Such secondary uses of those laws in ways designed to disadvantage gays and discriminate against them in their non-sexual lives suggests that the laws are largely masks or tools for more general anti-gay animus. Animus against gays as a class, rather than the apparently *de minimis* moral concern with their actual sexual conduct, is at the root of the Homosexual Conduct law.

Broad Burdens on a Narrow Class Suggest Animus. As this Court held in *Romer*, animus can be inferred from the narrow targeting and sweeping consequences of the law under review. In this case, the law singles out gays as a narrow class against whom to selectively enforce previously uniform notions of sexual morality.[11]

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[11] Indeed, gays as a class are particularly small, accounting for only 2-3 percent of the population. Posner, SEX AND REASON at 294-95. That small size heightens the danger of political breakdown and majority faction discussed in Part I, *supra*.

That the Texas law might be claimed to burden gay and straight persons alike by forbidding them equally from engaging in homosexual conduct is, at best, a facetious dodge. It is only gays who seek same-sex partners as a matter of course, not as a matter of extraordinary exception. To thus argue that gays and straights alike are denied same-sex relations and therefore are granted the equal protection of the law "is a wonderful replication (except for its lack of sarcasm) of Anatole France's observation that '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges * * * *.'" *Hill* v. *Colorado*, 530 U.S. at 744 (Scalia, J., dissenting) (quoting J. Bartlett, Familiar Quotations 550 (16th ed.1992)). The Homosexual Conduct law is no more targeted at straight persons having some incidental same-sex contact "than French vagrancy law was targeted at the rich." *Id.* To suggest otherwise is to honor the form of equality while mocking its substance.

Upon this narrow group is heaped the primary disability of being forbidden to engage in private sexual conduct allowed to the majority of consenting adults and the further prospective disabilities that come from any criminal conviction of having done nothing more or less than the majority of their fellow Texans.

The immediate impact of the law upon the personal lives of gay persons is obvious, deep, and sweeping. The gay citizen, and the gay citizen alone, is put to an awful choice. On the one hand, if he obeys the Homosexual Conduct law, he must forever forego a life of intimacy. He can never satisfy the desire common to all of humanity for the physical expression of love for another person to whom one is emotionally and sexually attracted. As this Court has recognized, sex is "a great and mysterious motive force in human life." *Roth* v. *United States*, 354 U.S. 476, 487 (1957). Gay persons who remain faithful to the law are uniquely denied access to this most basic aspect of human existence.

On the other hand, if he disobeys the Homosexual Conduct law, the gay citizen flouts the criminal code which all conscientious citizens strive to obey. In addition to violating this civic obligation, he must live with the knowledge and fear that, in the eyes of the state, he is but an as-yet-undiscovered criminal.

And, if convicted of disobeying the law, he then faces a daunting series of obstacles throughout his life that no opposite-sex couple would face for engaging in the same physical act. He must, for example, reveal his conviction for violation of the Homosexual Conduct law on applications for public and private employment, for housing, for credit, and for numerous other purposes. That fact may be used to discriminate against him in all of the pursuits that constitute ordinary civic life. As a consequence of conviction under the Homosexual Conduct law, he may be barred altogether from some types of employment. Evidence of his criminal conviction may be used against him in a child custody dispute or other litigation. In some jurisdictions he may be required to register as a sex offender, exposing to all of neighbors his criminal conviction. *See generally* Pet. 12-14 (describing numerous secondary legal consequences of conviction for petitioners in this case).

Thus, the Homosexual Conduct law potentially reaches into every conceivable aspect of a person's life: personal intimacy, employment, housing, and family law. Sweeping and fundamental are the consequences of this law to gay persons. If it is not a tool to deny them a life of physical affection with another human being, it is a sword hanging over their heads threatening them with discrimination in obtaining life's necessities.

The combination of targeting a narrow class and imposing broad burdens upon that class demonstrates both animus and unconstitutionality. It shows the Texas law to be

> a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation * * * [is] obnoxious to the prohibitions of the Fourteenth Amendment * * * *"

Romer, 517 U.S. at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

* * * * *

Perhaps no single one of the above indicia of animus is sufficient by itself to overcome a presumptively valid public-morality justification. But together, they are powerful indicators that Texas has singled out a class of citizens not to advance a moral view about their conduct, but to make that class of citizens unequal. Whatever moral interest Texas may assert, that interest, when coupled with the substantial indicia of animus present in this case, is simply insufficient to constitute a legitimate basis for the classification of gays as criminals.

In the end, it does neither morality nor law any favor to allow them to be used in the service of animus. To use public morality as a cover for animus, as Texas has done, is to cheapen morality and to cause it to be brought into disrepute. It is to conflate morality and hatred, undermining the pluralistic moral values of Liberty and Equality enshrined in our Constitution. This Court should recognize and reject the Homosexual Conduct law as the discriminatory product of animus against a politically small and unpopular class of citizens, affirm the more enduring morality of equality reflected in our Constitution, and thereby fulfill this Nation's historical tradition of bringing the outcast in from the cold.

CONCLUSION

For the foregoing reasons, the decision of Court of Appeals of Texas, Fourteenth District, should be reversed.

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IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

AMICUS BRIEF OF HUMAN RIGHTS CAMPAIGN; NATIONAL GAY & LESBIAN TASK FORCE; PARENTS, FAMILIES & FRIENDS OF LESBIANS & GAYS; NATIONAL CENTER FOR LESBIAN RIGHTS; GAY & LESBIAN ADVOCATES & DEFENDERS; GAY & LESBIAN ALLIANCE AGAINST DEFAMATION; PRIDE AT WORK, AFL-CIO; PEOPLE FOR THE AMERICAN WAY FOUNDATION; ANTI-DEFAMATION LEAGUE; MEXICAN AMERICAN LEGAL DEFENSE & EDUCATION FUND; PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND; SOCIETY OF AMERICAN LAW TEACHERS; SOULFORCE; STONEWALL LAW ASSOCIATION OF GREATER HOUSTON; EQUALITY ALABAMA; EQUALITY FLORIDA; S.A.V.E.; COMMUNITY CENTER OF IDAHO; YOUR FAMILY, FRIENDS & NEIGHBORS; KANSAS UNITY & PRIDE ALLIANCE; LOUISIANA ELECTORATE OF GAYS & LESBIANS; EQUALITY MISSISSIPPI; PROMO; NORTH CAROLINA GAY & LESBIAN ATTORNEYS; CIMARRON FOUNDATION OF OKLAHOMA; SOUTH CAROLINA GAY & LESBIAN PRIDE MOVEMENT; ALLIANCE FOR FULL ACCEPTANCE; GAY & LESBIAN COMMUNITY CENTER OF UTAH; AND EQUALITY VIRGINIA IN SUPPORT OF PETITIONERS

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This amicus brief is submitted in support of petitioners.[1]

INTEREST OF AMICI

Amici include seven national organizations that represent gay men, lesbians, bisexuals and their loved ones, as well as state-level organizations that represent gay people in each of the 13 states where consensual sodomy laws still exist. Amici also include numerous other national organizations with an interest in combating invidious discrimination of all kinds.[2] Amici collectively represent both the millions of gay Americans affected by laws of the kind challenged here, and the millions more who agree that sodomy laws reflect a condemnation of gay people that is inconsistent with the most basic principles upon which our government is founded.

SUMMARY OF ARGUMENT

Both the Equal Protection Clause and the Due Process Clause bar states from imposing disabilities on persons for illegitimate purposes. This Court has long recognized that targeting a class of people for no reason other than animus toward the class is not a legitimate purpose of government – especially where criminal sanctions are involved. Texas' Homosexual Conduct Law reflects just such a purpose. It exists not to condemn a particular act, but only to condemn the act when performed by particular persons, i.e., those who are physically and emotionally attracted to members of the same sex. It is backed by a tradition not of morality, but of animus, ignorance, and stereotype, and it builds upon that tradition by branding all gay people as criminal deviants, worthy only of contempt and censure rather than basic respect and equal treatment. In the too recent past, much of

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[1] Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution to this brief.

[2] The amici organizations are identified and described individually in the appendix to this brief.

society thought such condemnation justified because of a perceived pathology of homosexuality. In truth, it is utterly inconsistent with everything we now know about the lives of gay people as individuals, family, friends, co-workers, and leaders of the community. Most of our social and legal institutions have transformed themselves – or are well along the road – to reflect the increasingly widespread recognition of the essential humanity of gay people. Sodomy laws serve no function today other than to reinforce the vestiges of a noxious history of discrimination, a cruel purpose that no proper vision of our Constitution could sustain.

ARGUMENT

This case raises the twin questions whether Texas' Homosexual Conduct Law violates the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. We believe the answer to both questions is yes. We think it manifestly clear that Texas' sodomy law infringes on a fundamental right shared by the entire community – the right to be free from governmental intrusion into, and criminalization of, private sexual relations between consenting adults. Although the Court can and should decide the case on that basis, in this brief we explain why Texas' law must be invalidated regardless of whether the law infringes fundamental privacy and liberty interests. Texas' Homosexual Conduct Law violates both equal protection and due process because its solitary purpose is constitutionally illegitimate and irrational: to punish and brand as criminals a class of citizens defined by their emotional and physical attraction to members of the same sex as themselves.

This Court's equal protection cases have long established that even when a law targets for differential treatment a class that is not "suspect" for purposes of equal protection review, the law is invalid unless it ""bear[s] a rational relation to some legitimate end."" *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

Similarly, this Court's due process precedents have made clear that even when a law does not infringe upon any "fundamental liberty interest," the law is invalid if it is not "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). As we elaborate in this brief, Texas' Homosexual Conduct Law does not serve any purpose that is legitimate for a government of *all* the people. Texas' law is not a product of general anti-sodomy ecclesiastical traditions – which broadly condemned non-procreative sexual acts in which anyone might engage – but of a uniquely 20th century effort to root out gay people and alienate them from the community. This Court has long understood that a state may not treat what is "intrinsically the same quality of [criminal] offense" differently for different classes of citizens, *see McLaughlin v. Florida*, 379 U.S. 184, 194 (1964) (invalidating law criminalizing unmarried cohabitation for interracial couples but not for same-race couples), and that such differentiation in *criminal* laws works an especially serious constitutional harm, *id.* at 192. That is what we face here. By singling out for criminalization private, consensual sexual acts *only* when they are committed by members of the same sex, Texas legally defines the emotional and sexual identity of a substantial segment of our society as criminally deviant, branding the entire class not only as inferior, but as a danger to the community that must be deterred, punished, and excluded.

In short, Texas' law proscribes homosexual sodomy simply "to make [gay people] unequal to everyone else," *Romer*, 517 U.S. at 635, tarring and branding them as "criminal" simply out of moral aversion by some to their homosexuality. Because there is no legitimate government interest in a criminal law that exists only to condemn a class of disfavored citizens, *see Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* gov-

ernmental interest"), the Texas law violates even minimum constitutional standards of equal protection and due process.

I. TEXAS' HOMOSEXUAL CONDUCT LAW IS A PRODUCT OF ANTI-GAY ANIMUS

Texas' Homosexual Conduct Law, limited to same-sex intimacy, was enacted in 1973. It is not a statute woven from the fabric of the common law, reflecting an "ancient" anti-sodomy morality. It grows from a different, more recent tradition: one of anti-gay animus and bigotry.[3] That is, the law impermissibly subjects a class of persons to criminal sanction merely because of "animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

A. Ancient Sodomy Proscriptions Did Not Single Out Same-Sex Sodomy For Condemnation

It is a common misperception that gay people have always been singled out and their sexual relations specially criminalized. In fact, it is only relatively recently that sodomy has been proscribed solely between people of the same sex. Before the concept of a unique "homosexual identity" gained currency in the late nineteenth century, "illicit sexual acts between men were not seen as fundamentally different from, or necessarily worse than, illicit acts between a man and a woman."[4]

What offended traditional notions of morality, as re-

[3] To be clear: we do not believe any moral tradition justifies anti-sodomy laws of any kind, whether general or same-sex only. In our view all such laws infringe upon the fundamental right of all adults to engage in private, consensual acts of sexual intimacy. But even if the Court does not recognize such a right, we submit that today's sodomy laws, and especially same-sex-only sodomy laws, are still invalid because they exist *not* to impose a moral code of conduct on the private behavior of *all* persons, but to condemn and ostracize gay people specifically.

[4] Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 Yale L. J. 1073, 1088 (1988).

flected in English and early American common law, were a range of nonprocreative sexual practices. Because nonprocreation was the central offense, those practices were criminalized by early sodomy laws regardless of whether they were engaged in by same-sex or different-sex couples.[5] Most of today's sodomy laws continue to reflect this traditional disapproval of nonprocreative sexual activities regardless of the sexual identity of the couple involved. Of the thirteen states that continue to outlaw private consensual sodomy, nine apply their bans to all couples.[6] Only four states, including Texas, punish solely same-sex conduct.[7]

Sodomy proscriptions limited to same-sex relations are thus a distinctly modern phenomenon. The first Texas sodomy law enacted in 1860, for instance, prohibited anal sex whether committed by husband and wife, unmarried heterosexuals, or two male partners. Tex. Penal Code art. 342 (1860). In 1943, the state added a proscription of oral sex, but still without reference to the sexual identity of the part-

[5] *See* D'Emilio & Freedman, Intimate Matters: A History of Sexuality in America 16, 35 (1988); Eskridge, *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1012-13 (1997).

[6] *See* Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3) (1 year prison term); Fla. Stat. § 800.02 (60 days); Idaho Code § 18-6605 (5 years to life); La. Rev. Stat. § 14:89 (5 years); Miss. Code. Ann. § 97-29-59 (10 years); N.C. Gen. Stat. § 14-177 (3 years); S.C. Code Ann. § 16-15-120 (5 years); Utah Code Ann. § 76-5-403(1) (6 months); Va. Code Ann. § 18.2-361(A) (5 years). The Commonwealth of Puerto Rico also has a sodomy law, which makes oral and anal sex a crime for everyone, but all sexual intimacy (including touching or arguably even kissing) a crime for gay people only. P.R. Penal Code Art. 103 (6-12 years).

[7] *See* Kan. Stat. Ann. § 21-3505(a)(1) (6 month prison term); Mo. Rev. Stat. § 566.090 (1 year) (*but see State v. Cogshell*, 997 S.W.2d 534, 537 (Mo. Ct. App. 1999) (interpreting statute to apply only to non-consensual activity)); Okla. Stat. tit. 21 § 886 (10 years) (generally applicable statute construed by *Post v. State*, 715 P.2d 1105, 1110 (Okla. Crim. App. 1986) not to cover heterosexual consensual behavior); Tex. Penal Code Ann. § 21.06 (monetary penalty).

ners. Tex. Penal Code art. 524 (1943). It was not until 1973 that Texas repealed its general prohibition on sodomy and enacted the Homosexual Conduct Law in its place, specifically criminalizing consensual relations only between people of the same sex. Tex. Penal Code § 21.06.

B. The Modern Criminalization Of Homosexual Sodomy Reflects Modern Patterns Of Discrimination Against Gay People As A Class

There is, then, no ancient tradition of same-sex sodomy proscriptions that explains Texas' Homosexual Conduct Law. The explanation lies elsewhere: simple animus, not against sodomy generally, but against individuals physically and emotionally attracted to members of the same sex.

Although same-sex relationships have been documented throughout history, the concept of homosexuality (or heterosexuality) as a defining characteristic of one's identity is relatively recent. American "colonial society lacked even the category of homosexual or lesbian to describe a person," though colonial court records refer to incidents of sexual acts between two women or two men. D'Emilio, *Capitalism and Gay Identity*, *in* Cases and Materials on Sexual Orientation and the Law 46, 47 (Rubenstein ed., 2d ed. 1993). It was only in the late 19th century that American scientific literature began describing homosexuality as a pathological "condition, something that was inherent in a person, a part of his or her 'nature.'" *Id.* at 29.

The turn of the 20th century saw the rise of numerous forms of public attacks on gay people. Police targeted for arrest people perceived to be gay and raided institutions that served a predominately gay clientele.[8] Gay-themed plays

[8] *See* Chauncey, Gay New York 138-39 (1994).

and films were censored[9] and books were banned.[10] In Europe, discrimination against gay people reached a horrific apogee in World War II, when thousands were exterminated in Nazi concentration camps.[11] After the war, discrimination against gay men and lesbians took its most virulent American forms. Led by Joseph McCarthy, who grouped homosexuality with communism as a "grave evil to be rooted out of the federal government,"[12] the U.S. Senate conducted a special investigation into government employment of gay people and "other sex perverts."[13] In 1953, President Eisenhower terminated all gay people from federal employment, and the FBI sought to enforce the order by gathering data on local arrests for gay-related charges and membership in gay and lesbian civil rights organizations.[14] Gay aliens were excluded from admission into the United States as psychopaths or sexual deviants.[15]

[9] *See* Curtin, We Can Always Call Them Bulgarians: The Emergence of Lesbians and Gay Men on the American Stage (1987); Russo, The Celluloid Closet: Homosexuality in the Movies (1991).

[10] *See* Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551, 1557 (1993).

[11] *See, e.g.*, Haeberle, *Swastika, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, *in* Hidden from History: Reclaiming the Gay and Lesbian Past (Duberman et al. eds., 1989).

[12] *Developments in the Law – Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989).

[13] S. Rep. No. 241 (1950). The investigation concluded that gay people were unfit for employment because they "lack the emotional stability of normal persons" and threaten to "pollute" government offices. *Id.* at 3-5.

[14] *See* D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983); Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, Washington History (Fall/Winter 1994-95), at 44.

[15] Rich, Note, *Sexual Orientation Discrimination in the Wake of* Bowers v. Hardwick, 22 Ga. L. Rev. 773, 773 n.4 (1988); *see Boutilier v.*

States and municipalities also waged anti-gay campaigns. States enacted laws authorizing forced psychiatric examinations of persons convicted of sodomy or suspected of being "sexual deviants," and confinement of those deemed in need of a "cure" for their homosexuality.[16] An Alabama law "reform" commission announced that gay people are "persons with abnormal tendencies" who "have forfeited certain of their standings," and warned that Alabama would make itself "known as a place where it is tough for [such] persons."[17] Other states and local governments took steps to expose and exile gay people, including through commitment to the gruesome asylums of the day.[18]

So long as most gay people assumed that they had to hide their sexual orientation, official discrimination typically took the form of exposure and harassment. As gay people have increasingly refused to hide their orientation over the last forty years, discrimination has become more targeted. For example, Lambda Legal Defense and Education Fund, the first gay legal organization, was able to incorporate only by obtaining an injunction, *see In re Thom*, 301 N.E.2d 542 (N.Y. 1973), and other gay advocacy groups were not even that fortunate, *see State ex rel. Grant v. Brown*, 313 N.E.2d

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INS, 387 U.S. 118, 124 (1967) ("Congress commanded that homosexuals not be allowed to enter. The petitioner was found to have that characteristic and was ordered deported.").

[16] *See, e.g.*, Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 Law & Sex. 1, 75-76 & nn.355-65 (2001).

[17] Commission to Study Sex Offenses: Interim Report to the Alabama Legislature, June 12, 1967, at 5.

[18] *See, e.g.*, Garland, *supra* note 16; D'Emilio, *supra* note 14; Katz, Gay American History: Lesbians and Gay Men in the U.S.A. (1976); Chauncey, *The Postwar Sex Crime Panic*, *in* True Stories from the American Past (1993); Freedman, *"Uncontrolled Desires": The Response to the Sexual Psychopath, 1920-1960*, *in* Passion and Power: Sexuality in History (1989).

847 (Ohio 1974).[19] Gay men and lesbians routinely lost jobs, housing, and custody of their children based solely on their sexual orientation.[20] The law in many places continued to treat gay people as if they were unstable or mentally ill, even after the major American psychological and psychiatric societies rejected that notion.[21]

No credible authority disputes that gay people have been subjected to the most dehumanizing forms of discrimination employed by American government at any level in the 20th century.[22] It is in this ugly tradition that Texas' Homosexual Conduct Law follows: the modern practice of condemning gay people for who they are, as opposed to the more ancient tradition condemning acts in which anyone can engage.

C. Homosexual Sodomy Laws Harm All Gay People

Modern sodomy laws are intended to reinforce society's condemnation not of oral and anal sodomy, but of those who find themselves emotionally and sexually attracted to members of the same sex. "'After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.'" *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (quoting *Padula v. Webster*, 822

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[19] *See also* Cain, Rainbow Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement 59-61 (2000) (difficulties of gay charitable organizations in obtaining tax-exempt status).

[20] *See, e.g.*, Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 Harv. J. L. & Pub. Pol'y 21, 30-33 (1991) (collecting examples).

[21] *See* Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sex. 133, 142-43 (1991).

[22] In our view, the kind of governmental and private discrimination gay people have suffered, along with the political disempowerment such discrimination has caused, entitles gay men and lesbians to protection as a suspect or at least quasi-suspect class. We also believe that Texas' Homosexual Conduct Law could not survive whatever kind of heightened scrutiny such a designation would entail. As we elaborate here, however, the Court need not adopt that position for petitioners to prevail.

F.2d 97, 103 (D.C. Cir. 1987)). Indeed, as discussed below, sodomy laws are most commonly used by states *not* to punish particular persons for having engaged in proscribed acts, but to impose legal disabilities on persons who can be identified as "homosexual" without regard to any proof that they have engaged in the proscribed conduct. In other words, the primary function of sodomy laws today is to brand gay people as "criminals," a brand that itself works to inflict a variety of psychological and legal harms.

The branding effect explains why sodomy laws remain so harmful even though most are rarely enforced. In this case, of course, Texas' law *was* enforced, and gay people in Texas, at least, can take no comfort in a "history of nonenforcement." *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring). But serious harms flow even from a rarely-enforced law that exists to create a "criminal class whose members are treated as felons." Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. Rev. 103, 104 (2000). In states like Texas, to be gay is to be a criminal – a truth underscored by the fact that Texas law treats an "allegation" of homosexuality as slander per se. *See Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Civ. App. 1980) (calling another person gay is slanderous per se because of implication that he or she has violated criminal law). With or without prosecution, that classification by itself brings severe and far-reaching consequences for gay men and lesbians.

1. One of the most powerful effects of Texas' law, and laws like it, is on the mental and emotional well-being of those in the condemned class. Studies confirm that sexual expression is a vital component of personal psychological health for most human beings.[23] For both heterosexual and

[23] Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States 360 (1994) (national study by University of Chicago finding persons who have sexual experiences report higher levels of happiness than do those who have no sexual experiences); Masters

homosexual adults, it is essential to healthy intimate relationships.[24] To the extent the sodomy laws deter gay people in loving unions from expressing their love physically, adverse psychological consequences are inevitable.

But sodomy laws also injure gay people who are not actually deterred from physical relations. "Sodomy laws are kept on the books, even though state governments do not intend to actively enforce them, because the laws send a message to society that homosexuality is unacceptable." Leslie, *supra*, at 114. Put more bluntly, such laws exist to "tell[] gays they are scum." Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 Colum. Hum. Rts. L. Rev. 43, 53 (1986). That kind of message has its intended effect: some gay people internalize the message that they are inferior, resulting in self-loathing and associated emotional dysfunctions. Br. of Am. Psychological Ass'n & Am. Psychiatric Ass'n, *Romer v. Evans* (No. 94-1039), at 24-26.[25] Sodomy laws also generate "fear of arrest, loss of jobs, discovery, etc.," thus causing "severe mental health problems." *Baker v. Wade*, 553 F. Supp. 1121, 1130 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985). And sodomy laws inhibit gay people from "coming out" to friends and family, an act critical to the emotional health of many gay people.[26]

& Johnson, Human Sexual Inadequacy (1970); Gonsiorek & Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events*, *in* Homosexuality: Research Implications for Public Policy 161-76 (Gonsiorek & Weinrich eds. 1991).

[24] *See, e.g.*, Schwartz & Blumstein, American Couples 193, 201, 205-06 (1983); McWhirter & Mattison, The Male Couple: How Relationships Develop 262 (1984).

[25] *See also* D'Augelli, *Developmental Implications of Victimization of Lesbian, Gay, and Bisexual Youth*, *in* Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals 187, 191 (Herek ed. 1998) (describing the psychological consequences of stigmatization on gay, lesbian, and bisexual youth).

[26] *See, e.g.*, Hammersmith & Weinberg, *Homosexual Identity: Commitment, Adjustment and Significant Others*, 36 Sociometry 56, 78

2. Sodomy laws have legal consequences on gay men and lesbians beyond the uncertain threat of jail or other criminal sanction for their private sexual conduct. Labeling gay people "criminal" facilitates the imposition of a variety of legal disabilities "because the law permits differential treatment of criminals." Leslie, *supra*, at 115. The criminality of same-sex sodomy in Texas has been invoked by those seeking to close the public library to gay groups,[27] deny permanent residence to gay immigrants,[28] prohibit gay men and lesbians from fostering or adopting children,[29] ban gay and lesbian student groups on college campuses,[30] oppose protection of gay people from discrimination in employment,[31] and deny gay and lesbian Texans protection under proposed hate crime laws.[32] Many of amici have direct experience elsewhere with similar reliance on sodomy laws to support anti-gay policy positions – sometimes successfully –

(1973) ("having . . . 'settled into' a homosexual identity . . . leads to better psychological adjustment as indicated by a more stable, positive self-image, fewer anxiety symptoms, and less depression"); Leserman et al., *Gay Identification and Psychological Health in HIV-Positive and HIV-Negative Gay Men*, 24 J. Applied Soc. Psychology 2193, 2205 (1994) ("better psychological health [is] related to gay self-acceptance, participating in gay organizations and groups, socializing with other gay men, and parental disclosure and acceptance of being gay").

[27] *See* Associated Press, *Gay Rights Supporters' Meeting Site Draws Protest*, Dallas Morning News, Jan. 15, 1996, at 8D.

[28] *See, e.g., In re Naturalization of Longstaff*, 538 F. Supp. 589, 590-92 (N.D. Tex. 1982), *aff'd*, 716 F.2d 1439 (5th Cir. 1983).

[29] *See* Hughes, *Bill Would Ban Gay Texans From Adopting Children*, Houston Chron., Dec. 11, 1998, at A38.

[30] *See* Tomaso, *Stephen F. Austin Senate Bans Gay Group*, Dallas Morning News, Nov. 2, 1994, at 1A; *see also Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1320 n.4 (5th Cir. 1984).

[31] *See* Richardson, *Gay Rights Effort Likely to Be Tabled*, Ft. Worth Star-Telegram, Jan. 19, 1999, at 1.

[32] *See* Griest, *Hate Crimes Act Named for Byrd Heads for House*, Austin Am. Statesman, Mar. 12, 1999, at B10.

on the theory that gay people are necessarily criminals because of such laws. *See* App. 1a, 7a-13a. Sodomy laws are used routinely in civil litigation to disadvantage gay people who have never been charged or convicted of any crime. *See* Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813, 813-14 (2001). In the course of determining custody, for instance, some courts have relied on sodomy laws to conclude that gay men and lesbians are unfit parents simply because they can be presumed to be criminals.[33] Similarly, sodomy laws have been used in court as a basis for denying public employment to gay people.[34] One trial court refused to enforce an otherwise valid buy-sell agreement between two lesbians because the subject of the contract was their home, in which they likely committed criminal acts of sodomy. *See Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (reversing trial court order). Just this week, a key Virginia legislator suggested that a gay person's violations of a sodomy law could disqualify her from being a state judge.[35]

3. Finally, the Homosexual Conduct Law and its counterparts in other states contribute to an atmosphere of hatred

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[33] *See, e.g., Ex parte D.W.W.*, 717 So.2d 793, 796 (Ala. 1998) (upholding restrictions on lesbian mother's visitation rights in part because "the conduct inherent in lesbianism is illegal in Alabama"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (although "a lesbian mother is not *per se* an unfit parent . . . [c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth . . . ; thus, that conduct is another important consideration in determining custody").

[34] *See* Hassel, *supra*, at 836-38; *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 142 n.13 (N.D. Tex. 1981) ("The overriding reason that the Plaintiff was not hired [as a storekeeper for the property storeroom of the Dallas Police Department] was because he admitted to engaging in homosexual conduct prohibited by Texas penal statutes."); *Shahar v. Bowers*, 114 F.3d 1097, 1105 n.17 (11th Cir. 1997) (en banc) (noting Georgia argument that lesbian employee should be presumed to be lawbreaker).

[35] Scanlon & Halladay, *Sex Life May Be Used Against Judges*, Daily Press, Jan. 15, 2003.

and violence that puts gay people, and those perceived to be gay, at risk.[36] Despite significant progress in recent years, *see infra* Section II.B., gay men and lesbians continue to be disproportionately targeted for hate-related intimidation and violence.[37] The current data in Texas are illustrative. In Dallas, over a five-year period, there were about three race-related hate crimes reported for every 100,000 people of color in the population, and roughly 11 hate crimes based on sexual orientation reported for every 100,000 gay people. Gay people in Dallas are about four times more likely to be the victim of a hate crime than are all non-gay people. A gay person in Houston is about 9 times more likely than a non-gay person to be the victim of a hate crime.[38] Gay and lesbian youth routinely are tormented with epithets, bullied, and even attacked by their peers,[39] often with severe conse-

[36] *See* Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 J. Interpers. Violence 316 (1990) (discussing connection between social stigmatization of gay people and anti-gay violence); Garland, *supra* note 16 (discussing connection between government discrimination against gay people and other groups and private violence against such groups).

[37] According to the FBI, in 1995 and 2000 anti-gay hate crimes were the third most prevalent form of bias crime, after hate crimes motivated by racism or religious prejudice. U.S. Dept. of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *Uniform Crime Reports, Hate Crime Statistics, 1995-2000*.

[38] Rubenstein, An Empirical Analysis of Hate-Crimes Against Gay People in the United States, 1990-2000 (forthcoming 2003) (analyzing FBI data).

[39] One recent study concluded that gay, lesbian, and bisexual teens report "significantly greater exposure to violence" than their peers, are three times as likely to miss school because they feel unsafe, and are twice as likely to have been injured or threatened with a weapon at school. Faulkner & Cranston, *Correlates of Same-Sex Sexual Behavior in a Random Sample of Massachusetts High School Students*, 88 Am. J. Pub. Health 262, 263-64 (1998); *see also* Phillips & Baker, PFLAG, Safe Schools Study (September 6, 2002).

quences for their physical and mental health.[40]

Sodomy laws "create the milieu that informs society . . . that the lives of gay people are not worthy." Leslie, *supra*, at 122. Sodomy laws facilitate violence against gay people by allowing its perpetrators to "rationalize their violence as vigilante enforcement of sodomy laws." *Id.* at 124. Such laws also deter victims of bias-motivated crimes from reporting those crimes to the police, leading to a lower risk of arrest and still more bias-motivated violence. *Id.* at 125.

Despite great advances in recent years toward legal and social equality for gay people, *see infra* section II.B., sodomy laws remain a tangible vestige of a not-yet-bygone era of animus and stereotype – an era that clings in part because of the collateral ways these laws maintain and reinforce the subjugation of all gay people. Though rooted in what is now a fading bigotry, these laws still stand as a substantial barrier to full and equal citizenship for gay citizens.

II. THERE IS NO LEGITIMATE JUSTIFICATION FOR BRANDING HOMOSEXUALS AS CRIMINALLY DEVIANT

Enforcing moral condemnation of gay people as a class by criminalizing the conduct that defines the class serves no legitimate state purpose. By now, all but the obtuse and the unkind recognize that persons who are physically and emotionally attracted to members of the same sex are not less productive – or more dangerous – members of the community by mere dint of their sexual orientation. Any suggestion that sodomy laws are rational because gay people *should* be branded as criminals is indefensible. Indeed, in view of the great social and legal progress made in recent years toward

[40] D'Augelli, *supra* note 25, at 189-91; Remafedi, *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 Am. J. Pub. Health 57 (1998) (homosexual and bisexual teenagers are at greater risk of suicide than other teens).

recognizing the essential humanity of gay men and lesbians, sodomy laws now persist only as cruel anachronisms in a small number of jurisdictions unwilling – or unable, given the inertial forces affecting most legislative change – to rid themselves of the vestiges of class-based animus and bigotry.

A. Homosexual Sodomy Laws Brand As Criminally Deviant Millions Of Productive Citizens

Laws that brand gay people as criminally deviant do not operate on some abstract "class." They harm real men and women – men and women who live in towns and cities across the United States, who live with long-term domestic partners in committed relationships, who raise children, who serve their country in the military and in the government. Even the most cursory snapshot of the gay community is enough to demonstrate the irrationality of laws that assign the label "criminal" to all gay citizens.[41]

There are approximately six million openly gay men and women in the United States,[42] and 450,000 gay men and lesbians in Texas. Census data show same-sex couples living across the entire country, in 99.3 percent of all counties in the United States.[43] Gay couples live in 252 of Texas' 255

[41] Unless another source is identified, the following demographic portrait is drawn from empirical analyses of the 1990 and 2000 Census data conducted by the Williams Project at the UCLA Law School. This work is available at www1.law.ucla.edu/~erg/xgaydata.html.

[42] The most widely accepted study of sexual practices in the United States is the National Health and Social Life Survey (NHSLS). The NHSLS found that 2.8% of the male, and 1.4% of the female, population identify themselves as gay, lesbian, or bisexual. *See* Laumann et al., The Social Organization of Sex: Sexual Practices in the United States (1994). This amounts to nearly 4 million openly gay men and 2 million women who identify as lesbian.

[43] Smith & Gates, Human Rights Campaign, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households - A Preliminary Analysis of 2000 United States Census Data 2 (2001). The Census Bureau does not ask people their sexual orientation, but through its questions about household composition, it does collect data about households with same-sex partners. It has been estimated, however, that only about one third of same-sex couples identify themselves as such to census-takers. *See* Black et al., *Demographics of Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 Demography 150 (2000).

counties, including numerous small or rural counties. Gay couples nationally are about as likely to live in metropolitan areas as other couples: about 24 percent of the gay couples identified by the 2000 Census live in ten metropolitan areas; for the population at large, that figure is about 20 percent.

Same-sex couples are "similar in racial makeup to the population as a whole."[44] According to 1990 Census data, whites comprised about 76 percent of the total adult population, and about 77 percent of the adult population living in same-sex couples. About nine percent of all individuals living in same-sex relationships were Black, as compared with about 11 percent of the total adult population. Between six and seven percent of the total adult population was Hispanic, and a similar proportion was Asian; roughly the same percentages were reported among same-sex couples.[45]

Gay men and lesbians also tend to live in committed relationships. The 2000 Census data count 1.2 million gay people living as couples, but that number reflects a significant undercounting of the actual number of gay couples. If the 2000 undercount of gay couples is as significant as the best estimates of the 1990 Census undercount calculate, *see supra* note 43, it would mean that as many as 60 percent of all gay people live in couples,[46] compared to approximately 57 per-

[44] Black et al., *supra* note 42, at 150.

[45] Full 2000 Census data has not been released, but one study of significant preliminary 2000 data indicates that gay couples continue to reflect roughly the same racial makeup as the overall population. *See* Cahill et al., NGLTF Policy Inst., Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Families 11 (2002).

[46] *See also* Vetri, *Almost Everything You Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. Rev. 1

cent for the overall adult population. Even if the 2000 undercount is less significant, it is at least clear that most gay people, like most non-gay people, aspire to live in committed, loving relationships and seek a strong sense of family in their lives.[47] In Texas alone, even unadjusted census figures report 86,000 gay people living with same-sex partners.

Many gay men and lesbians raise children in their homes. Some are parents of children from prior marriages; others have become parents since entering into committed relationships with same-sex partners.[48] The Census suggests that 13 percent of same-sex couples have children living in their homes; more targeted studies show that approximately 28 percent of lesbians and 14 percent of gay men are raising children in their households.[49] The available evidence indicates that literally millions of children have a least one gay parent,[50] and "[s]ignificant sociological and psychological studies . . . have demonstrated that children raised by gay or lesbian parents are as emotionally well adjusted as children raised in heterosexual households," Vetri, *supra* note 46, at 81 (citing numerous studies).

Gay men and lesbians serve their country in both civilian and military capacities. There are three openly gay members of Congress (two Democrats and one Republican) and 42

(1998) (discussing higher estimates); Herek, Myths About Sexual Orientation, *supra*, at 161-62 (citing surveys of gay men and lesbians reporting that 60% of gay men and 64% of lesbians live in committed relationships).

[47] Carrington, No Place Like Home: Relationships and Family Life among Lesbians and Gay Men (1999); Peplau, *Lesbian and Gay Relationships* (1993), *in* Psychological Perspectives on Lesbian & Gay Male Experiences (Garnets & Kimmel eds. 1999).

[48] *See* Vetri, *supra* note 46, at 80-82.

[49] *See* Black, *supra* note 43, at 150.

[50] American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (2002).

openly gay legislators in 20 different states.[51] Gay men and lesbians serve the current Administration in positions ranging from ambassador to arms control advisor to Environmental Protection Agency official.[52] And gay men and lesbians are generally as likely to have served in the military as non-gay Americans[53] – a service record made more remarkable by the fact that gay service-members must negotiate the military's long-standing regulations regarding homosexuality. *See* 10 U.S.C. § 654 (1995).

Finally, this Court's own cases reflect the diversity of the gay community in America. In the past two decades, the Court has heard cases involving a variety of lesbians and gay men – school teachers from Oklahoma,[54] a bartender from Georgia,[55] a "covert electronics technician" at the CIA,[56] "descendants of the Irish immigrants" from Boston,[57] a diverse group of Colorado citizens, "some of them government employees,"[58] an "exemplary" New Jersey Eagle Scout,[59] and now two gay men – one black, one white – from Texas. This range of litigants alone suggests the diversity of the gay community and of the lives led by gay citizens.

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[51] Frontlines, *News From The Gay & Lesbian Victory Fund* 1 (Postelection 2002).

[52] Epstein, *Bush's Gay Nominees Draw Little Opposition*, San Francisco Chron., Dec. 29, 2002, at A1.

[53] The 1990 Census found that about 17 percent of the adult population overall had some military experience, while about 14 percent of those in same-sex couples did. In Texas, the percentages were 16.43 for the general population and 15.14 for those in same-sex couples.

[54] *Board of Educ. of Oklahoma City v. National Gay Task Force*, 470 U.S. 903 (1985).

[55] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[56] *Webster v. Doe*, 486 U.S. 592, 594 (1988).

[57] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 561 (1995).

[58] *Romer v. Evans*, 517 U.S. 620, 625 (1996).

[59] *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000).

These are the people branded as criminals by laws like Texas' Homosexual Conduct Law. Another is Mark Bingham, who on September 11, 2001, called his mother from United Airlines Flight 93 and then helped to save countless American lives by fighting against the terrorists aboard his plane.[60] To his country, Mr. Bingham is a hero; in Texas, he is a criminal. On the same day that Mr. Bingham died, the Reverend Mychal F. Judge, chaplain to the New York City Fire Department and also gay, was killed by falling debris in the lobby of the World Trade Center shortly after administering last rites to a dying firefighter.[61] Congress memorialized Father Judge and his bravery with the Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act, which allows public safety officers killed in the line of duty to have federal benefits flow to same-sex partners. Pub. L. No. 107-196, 116 Stat. 719 (June 24, 2002).

There is nothing about gay men and women in America that justifies treating them as criminally deviant under laws like Texas' Homosexual Conduct Law. Gay men and lesbians are partners and parents, neighbors and coworkers, occasional heroes. There is no legitimate and rational basis for singling out this group for branding as criminal.

B. Homosexual Sodomy Laws – Not Gay People – Are The Real Social And Legal Deviants

As demonstrated above, Western legal and religious tradition did not single out homosexual sodomy for condemnation. To the extent that homosexual sodomy laws arise from the different and more modern tradition of condemning gay people, it is a tradition that has otherwise receded in recent years in most of our own public and private institutions. The

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[60] Nieves, *Passenger on Jet: Gay Hero or Hero Who Was Gay?*, N.Y. Times, Jan. 16, 2002, at A12.

[61] Wakin, *Killed on 9/11, Fire Chaplain Becomes Larger Than Life*, N.Y. Times, Sept. 27, 2002, at A1.

United States is alone among modern Western democracies in outlawing same-sex relations in any substantial part of the country.[62] Even in this country, homosexual sodomy laws have become the last gasp of a few recalcitrant jurisdictions, as the larger society has repudiated not only the condemnation but also many of its vestiges.

1. Public policy toward gay men and lesbians has changed dramatically over the past few decades. As recently as 1986, when this Court last addressed the issue, 24 States and the District of Columbia had criminal sodomy laws on their books. *See Bowers*, 478 U.S. at 194. Since then, half those jurisdictions have repealed their sodomy laws or invalidated them under their state constitutions, so that today 37 states and the District of Columbia do not criminalize any form of adult, consensual sodomy.[63] As we have seen, only thirteen states outlaw sodomy at all, and only four of those single out same-sex conduct. *See supra* at 5.

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[62] Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 Colum. Hum. Rts. L. Rev. 33, 34 (1995).

[63] Repeal or invalidation of same-sex-only sodomy laws since *Bowers*: 1993 Nev. Stat. 236 (repealing Nev. Rev. Stat. § 201.193); *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1993); *Gryzcan v. Montana*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

Repeal or invalidation of general sodomy laws since *Bowers*: 2001 Ariz. Legis. Serv. 382 (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Law 10-14 (amending D.C. Code § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Williams v. Maryland*, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998); *Michigan Org. for Human Rights v. Kelly*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. 4th Dist. May 15, 2001). In Maryland, Michigan, and Minnesota, the States did not appeal the lower court decisions striking down the laws.

At the time of *Bowers*, only one state protected lesbians and gay men from discrimination based on sexual orientation. Today, 13 states and the District of Columbia have anti-discrimination laws that protect lesbian and gay employees.[64] Twenty-two states and the District of Columbia outlaw discrimination in state employment by Executive Order, statute or regulation.[65] At the close of the 107th Congress, 68 Senators (44 Democrats; 23 Republicans; 1 Independent) and 268 Representatives (192 Democrats; 75 Republicans; 1 Independent) had adopted a written policy indicating that sexual orientation is not a factor in employment decisions for their congressional offices.[66] President Clinton issued and President Bush has let stand an Executive Order that bans sexual orientation discrimination in federal executive branch employment. Executive Order No. 13087 (U.S. May 28, 1998).

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[64] Cal. Gov't Code § 12940; Conn. Gen. Stat. § 46a-81c; D.C. Code § 2-1402.11; Haw. Rev. Stat. § 378-2; Md. Code Ann., art. 49B § 16; Mass. Gen. Laws ch. 151B § 4; Minn. Stat. § 363.03; Nev. Rev. Stat. § 613.330; N.H. Rev. Stat. § 354-A:7; N.J. Stat. § 10:5-12; N.Y. Exec. Law § 296; R.I. Gen. Laws § 28-5-7; Vt. Stat. Ann. tit. 21 § 495; Wis. Stat. §§ 111.31-111.36.

[65] Alaska Admin. Order No. 195 (2002); Cal. Gov. Code § 12940; 4 Colo. Code Regs. § 801, R-9-3; Conn. Gen. Stat. § 46a-81c-m; Del. E.O. 10 (2001); Haw. Rev. Stat. § 368-1, 378-1; 1996 Illinois Admin. Order No. 2; Office of the Governor of Indiana, Governor's Policy Statement (Aug. 1, 2001); Md. Regs. Code tit. 1 § 01.1995.19; Mass. Gen. Laws ch. 151B §§ 3-4; Minn. Stat. §§ 363.01-03; Montana Nondiscrimination-EEO Rules, 2.21.4001 et seq. (Dec. 22, 2000); Nev. Rev. Stat. § 281.370; N.H. Rev. Stat. § 354-A:2; N.J. Stat. § 10:5-4, 10:5-12 et seq.; 9 NYCRR §§ 4.28 ,5.33; New Mexico Executive Order No.85-15 (Apr. 1, 1985); Pennsylvania Executive Order no. 2002-3, May 3, 2002; R.I. Gen. Laws §§ 28-5-3, 28-5-7; Vt. Stat. Ann. tit. 3 § 963; *id.* tit. 21 § 495; Wash. Admin. Code § 356-09-020; Washington Executive Order 85-09; Wis. Stat. § 230.18; D.C. Code § 2-1402.31.

[66] Human Rights Campaign, Congressional Scorecard 107th Congress (2002) (available at www.hrc.org/congress/107/scorecard.pdf).

At the time of *Bowers*, no state employer offered domestic-partner health benefits. Today, nine States and the District of Columbia offer such benefits.[67] In addition, at least 129 cities, counties and quasi-governmental agencies (such as public transit systems and school districts) provide domestic-partner benefits for their employees.[68] Nine cities or counties have passed equal benefits ordinances that require city or county contractors to offer the same benefits to domestic partners as they offer to spouses.[69] After the September 11 terrorist attacks, New York Governor George Pataki issued an Executive Order granting surviving partners of gay victims of the attacks the same benefits from the State's Crime Victims Board as spouses. *See* Executive Order No.

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[67] In 1994, Vermont became the first state to offer benefits to same-sex and opposite-sex couples. New York followed suit in 1994, Oregon in 1998, and Maine, Rhode Island, and Washington state in 2001. California has offered benefits only to same-sex partners since 1999. In 2002, Minnesota also began to offer benefits to same-sex partners, and nine years after having voted to do so, Congress allowed the District of Columbia to use local funding for the administration of a domestic partner registry and health insurance availability program for its employees. *See* Human Rights Campaign, State Governments that Offer Domestic Partner Health Benefits (available at www.hrc.org); Human Rights Campaign Foundation, State of the Workplace 9-15 (2001).

[68] Human Rights Campaign Foundation, The State of the Family: Laws and Legislation Affecting Gay, Lesbian, Bisexual and Transgender Families 14 (2002).

[69] In 1996, the City of San Francisco passed the nation's first equal benefits ordinance, requiring employers that contract with the city government to offer the same benefits to employees' domestic partners as they offer to their legal spouses. S.F. Admin. Code § 12B.1(b). Since then, the following jurisdictions have passed similar laws: Los Angeles, L.A. Admin. Code § 10.8.2.1; Seattle, Seattle Mun. Code § 119748; Berkeley, Berkeley Mun. Code 13.29.010; Oakland, California, Oakland Mun. Code ch. 2.32; San Mateo County, California, San Mateo County Ord. No. 2.93.020; Tumwater, Washington, Tumwater Mun. Code 02000-028; and Minneapolis, Minnesota, as yet unchaptered. *See generally* Olson, *Minneapolis Requires Contractors to Provide Partner Benefits*, Minneapolis Star Tribune, Dec. 14, 2002.

113.30, October 10, 2001 (New York). The American Red Cross issued written guidelines making same-sex survivors eligible for September 11 relief assistance, becoming the first national relief agency to provide detailed policies on how to respect same-sex relationships when distributing disaster-related assistance.[70]

At the time of *Bowers*, no state had enacted a hate-crimes law that included sexual orientation. Today, 28 states and the District of Columbia have such laws.[71] In 1990, Congress enacted the Hate Crimes Statistics Act, mandating that the federal government collect national hate-crime statistics, and defining "hate crimes" as crimes that "manifest evidence of prejudice based on race, religion, disability, *sexual orientation*, or ethnicity." *See* 28 U.S.C. § 534 (emphasis added). In 1994, Congress enacted the Hate Crimes Sentencing Enhancement Act, directing the U.S. Sentencing Commission to provide a sentencing enhancement of "not less than 3 offense levels" for any offense determined by the jury to be a "hate crime," defined to include a crime motivated by, *inter alia*, "the actual or perceived . . . sexual orientation of any person." *See id.* § 994. In 2002, the Justice Department for

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[70] Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. Times, May 30, 2002, at A1.

[71] Ariz. Rev. Stat. § 41-1750; Cal Penal Code § 422.75; Conn. Gen. Stat. §§ 53a - 181j – l; Del. Code tit. 11 § 1304; D.C. Code §§ 22-3701 - 3702 & 22-3704; Fla. Stat. § 775.085; Haw. Rev. Stat. § 846-51; 720 Ill. Comp. Stat. 5/12-7.1; Iowa Code § 729A.1-2; Kan. Stat. Ann. Supp. § 21-4716 (2002); Ky. Rev. Stat. § 532.031; La. Rev. Stat. § 14:107.2; 17-A Me. Rev. Stat. § 1151; Mass. Gen. Laws ch. 265 § 39; Minn. Stat. § 611A.79; Mo. Rev. Stat. § 557.035; Neb. Rev. Stat. § 28-111; Nev. Rev. Stat. § 41.690; N.H. Rev. Stat. §§ 651:6 & 21:49; N.J. Stat. § 2C:16-1; N.Y. Penal Law §§ 485.00-05 & 240.30 - 240-31; N.Y. C.P.L.R. § 200.50; Or. Rev. Stat. §§ 166.165 & 181.550; Act. of Dec. 3, 2002, H.B. 1493 (Pa.); R.I. Gen. Laws § 12-19-38; Tenn. Code Ann. § 40-35-114; Tex. Code Crim. Proc. art. 42.014 (2002); Tex. Penal Code § 12.47 (2002); Vt. Stat. Ann. tit. 13 § 1455; Wash. Rev. Code § 9A.36.080; Wis. Stat. § 939.645.

the first time invoked the federal hate crimes sentencing enhancement to charge a person with a hate crime based on sexual orientation. The Department indicted Darrell David Rice for the 1996 slaying of two female hikers in a national park in Virginia, alleging that "the defendant hated women and lesbians and that hatred was a motive for his killing."[72] The Department sought increased punishment in part because the defendant, according to his statement, "hate[d] gays" and believed his victims "deserved to die because they were lesbian whores."[73]

At the time of *Bowers*, no state explicitly prohibited anti-gay harassment in schools. Today, eight States and the District of Columbia have laws prohibiting such harassment.[74] A growing number of schools and school districts also have forbidden anti-gay harassment.[75] Gay-Straight Alliances – student-led clubs organized to make schools welcoming and safe for gay students – have formed in thousands of schools throughout the country.[76]

Laws relating to family relationships have also changed significantly since the time of *Bowers*. Vermont now permits same-sex couples to obtain civil union licenses; five additional states, the District of Columbia, and 41 cities and counties have domestic partnership registries that permit gay and lesbian couples to publicly register and declare their

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[72] Masters, *Gay Bias Charged in Deaths*, Wash. Post, April 11, 2002, at A1.

[73] Glod, *Suspect Pleads Not Guilty in Hikers' Deaths*, Wash. Post, April 26, 2002, at B2.

[74] Cal. Educ. Code § 220; Conn. Gen. Stat. § 10-15c; Mass. Gen. Laws ch. 76 § 5; Minn. Stat. § 363.03; 2002 N.J. Sess. Law Serv. Ch. 83; Vt. Stat. Ann. tit. 16 § 11; 2002 Wash. Legis. Serv. ch. 207.

[75] Tuller, A *New Dimension in Snapshot of Gay Teenagers*, N.Y. Times, Dec. 24, 2002, at F7.

[76] Nationally, 1,601 Gay-Straight Alliances have registered with the Gay, Lesbian, Straight Education Network. *Student and GSA Club Directory* (available at www.glsen.org/templates/student).

commitment.[77] Adoption laws have also changed.[78] Every state except Florida now has a nondiscriminatory adoption statute that permits gay men and lesbians to be considered as adoptive parents. Approximately half the states have approved second-parent adoptions – which permit a second parent to adopt a child in a manner analogous to stepparent adoptions – for same-sex couples who are jointly raising their children.[79] And a majority of states have now abandoned *per se* rules against gay parents in post-divorce custody disputes, instead demanding evidence of harm before a parent's sexual orientation will affect custody or visitation decisions.[80]

2. The private sector has changed as well. In 1982, the first employer offered domestic partner benefits to its lesbian and gay employees.[81] By 1990, that number reached almost two dozen; today, it has jumped to at least 4,446. In 2002, more than 30 percent of Fortune 500 and over half of Fortune 50 companies offered domestic-partner health insur-

[77] State of the Family, *supra* note 68, at 14 (the five states are California, Connecticut, Maine, Oregon, and Washington; Hawaii also has a similar law); van der Meide, NGLTF, Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States 7.

[78] Organizations including the American Academy of Pediatrics, the American Psychological Association, the Child Welfare League of America, and the North American Council on Adoptable Children have all spoken out in favor of allowing gay men and lesbians to adopt, *see* Human Rights Campaign Foundation, *Parenting* (available at www.hrc.org/familynet), and the American Academy of Pediatrics has issued a policy statement supporting second-parent adoptions for same-sex parents, *see* State of the Family, *supra* note 68, at 23.

[79] *See* Human Rights Campaign Foundation, *Second-Parent Adoption* (available at www.hrc.org/familynet).

[80] *See* Rubenstein, *supra*, at 810-811; Reiss et al., 1 Georgetown J. Gender & Law 383, 392-97 (2000).

[81] Seise & Raimondi, Note, *Employment Benefits: Will Your Significant Other Be Covered?*, 17 Hofstra Lab. & Emp. L.J. 357, 376 (2000).

ance, and more than 2,100 employers – including businesses, unions, colleges and universities and state and local governments – include sexual orientation in their equal employment opportunity policies.[82]

3. Changes in public and private sector policies toward gay men and lesbians reflect a dramatic shift in social attitudes. In a November 2001 survey of opinions about homosexuality by the Kaiser Family Foundation, 76 percent of respondents said they "completely agree[d]" that society should not place *any* restrictions on sex between consenting adults in the privacy of their own homes.[83] Support for lesbian and gay "equal rights in terms of job opportunities" has grown to 85 percent in 2001, according to a Gallup Poll trend.[84] Americans support sexual orientation nondiscrimination laws (and not just the principle of nondiscrimination) by a two to one margin.[85] And a national study of registered voters found that 78 percent of respondents believed that the issue of gay and lesbian adoption should be decided on a case-by-case basis rather than based solely on sexual orientation, more than half opposed laws preventing gay people from adopting children, and almost two-thirds opposed making joint adoption for gay couples illegal.[86]

Changing social attitudes are reflected in ways other than poll numbers. The broadly emerging acceptance of homo-

[82] HRC Worknet Report, The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans: A Semiannual Snapshot (2002).

[83] Henry J. Kaiser Family Foundation, Inside-Out: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation, Nov. 11, 2001 (available at www.kff.org).

[84] Wagner, *Poll Track for June 9, 2001*, Nat'l J., June 9, 2002.

[85] Yang, NGLTF Policy Inst., The 2000 National Election Study and Gay and Lesbian Rights: Support for Equality Grows (2001).

[86] Penn & Whitman, Human Rights Campaign, National Survey on Gay Family Issues Will Help Inform the Debate 2 (1997).

sexuality in official doctrines of many religions in the past few decades, for example, reflects solemn and profound social progress for gay people. Numerous religious institutions now squarely affirm full and equal civil rights for gay people.[87] Many formally condemn discrimination on the basis of sexual orientation and even call for legal protections against such discrimination.[88] A growing number of religions recognize and celebrate same-sex unions,[89] a practice virtually unknown twenty years ago.

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[87] Alliance of Baptists, Rep. of the Task Force on Human Sexuality, Mar. 2001 (available at www.allianceofbaptists.org); American Friends Service Comm. (Quakers) Bd. of Dirs., A Concern about Sexual and Gender Identity, Nov. 1999 (available at www.afsc.org); Episcopal Church, General Conv., Resolutions 1976-A071, 1982-B061 & 1994-C019 (available at www.episcopalarchives.org); Evangelical Lutheran Church in Am., Church Council Action CC.93.3.37 (1993) (available at www.elca.org); The Reformed Church in Am., *Homosexuality: A Biblical and Theological Appraisal* (1978), *reprinted in* The Churches Speak on: Homosexuality 172 (J. Gordon Melton ed. 1991); United Church of Christ, Tenth Gen. Synod, *Pronouncement on Civil Liberties Without Discrim. Related to Affectional or Sexual Preferences* (1975), *reprinted in* Churches Speak, *supra*, at 205-07; United Methodist Church, *Statement on Social Prins.* (1988), *reprinted in* Churches Speak, *supra*, at 242; UMC, The Book of Discipline of The United Methodist Church 66H (2000) (available at www.umc-gbcs.org); U.S. Catholic Bishops' Statement on Marriage and Family (2002) (available at www.usccb.org/laity/always.htm).

[88] *E.g.*, Catechism of the Catholic Church 2357-59 (1994) (available at www.vatican.va/archive/catechism/p3s2c2a6.htm); Cent. Conf. of Am. Rabbis, *Ad Hoc Comm. on Human Sexuality* (June 1998) (available at ccarnet.org/hs.html); Church of the Brethren, *Human Sexuality from a Christian Perspective* (1983), *reprinted in* Churches Speak, *supra*, at 86-87; Presbyterian Church, Mins. of the 199th Gen. Assem. at 776 (1987) (available at www.pcusa.org/101/101-homosexual.htm); *see* UCC, *Equal Employ. Oppor. Pol.* (1980), *reprinted in* Churches Speak, *supra*, at 209.

[89] *E.g.*, Anglican Church of Canada, Decl. of the Synod of the Diocese of New Westminster, June 2002 (available at newwestminster.anglican.org); *Benton v. Presbytery of Hudson River*, PC(USA) Mins. 2000. Pt. I. at 586-89; 1999 Calif. Holy Union Serv. (officiated by 150-plus UMC and ecumenical clergy) (available at www.umaffirm.org);

Indeed, same-sex commitment ceremonies have become so common that the *New York Times* recently began reporting them alongside traditional weddings in a new "Weddings/Celebrations" section. *See Times Will Begin Reporting Gay Couples' Ceremonies*, N.Y. Times, Aug. 18, 2002, at A30 (citing "growing and visible trend in society toward public celebrations of commitment by gay and lesbian couples"). At least 125 other daily newspapers do the same.[90]

Changes in social attitudes are also vividly reflected in popular entertainment. ABC lost $1.6 million in advertising revenue in 1989 when it aired just one episode of the TV series *thirtysomething* suggesting a same-sex encounter.[91] Today one of the most popular sitcoms on television – *Will & Grace* – stars two gay characters,[92] and other programs regularly feature gay characters and themes. Popular movies, too, now regularly include accurate and positive depictions of gay characters and relationships[93] – a rarity just a decade ago. And companies no longer fear including gay themes in their "mainstream" advertising.[94]

Cent. Conf. of Am. Rabbis, *supra*; Episcopal Church, Decl. of Bishop of Diocese of Kan., June 2002 (available at www.ecusa.anglican.org); *see also* Courage to Love: Liturgies for the Lesbian, Gay, Bisexual, and Transgender Commun. (Duncan ed. 2002); Equal Rites: Lesbian and Gay Worship Ceremonies and Celebrations (Cherry & Sherwood eds. 1995); Lesbian and Gay Marriage: Private Commitments, Public Ceremonies (Sherman ed. 1992).

[90] *See* Jonsson, *Paper Will Run Announcement of Gay Couple's Anniversary; Post-Dispatch Joins Others Nationwide in Accepting Ads*, St. Louis Post-Dispatch, Sept. 13, 2002, at C4.

[91] Tropiano, The Prime Time Closet: A History of Gays and Lesbians on TV 129 (2002).

[92] Stilsen, *Red's Got Cred*, Daily Variety, Nov. 21, 2002, Special Section, at A1.

[93] *See, e.g.*, The Hours (2002); Far from Heaven (2002); Billy Elliott (2000); Object of My Affection (1998); My Best Friend's Wedding (1997); Beautiful Thing (1996); Philadelphia (1993).

[94] *See* www.commercialcloset.org.

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Amici believe that *Bowers* was wrong when decided, that the shifts in law and attitude detailed above amplify its flaws, and that the Court should overrule the decision. *Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992) (Court may depart from "old rule" when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or [when] the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"). But the Court need not overrule *Bowers*' holding that there is no fundamental right to engage in consensual acts of sodomy for petitioners to prevail. No law can be based merely on moral distaste for persons attracted to those of the same sex. Laws like the Texas Homosexual Conduct Law have no other justification.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

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APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

The Human Rights Campaign ("HRC") is America's largest gay and lesbian organization. With more than 450,000 members nationwide, HRC provides a national voice on gay and lesbian issues. HRC effectively lobbies Congress; mobilizes grassroots action in diverse communities; invests strategically to elect a fair-minded Congress; and increases public understanding through innovative education and communication strategies. HRC is a bipartisan organization that works to advance equality based on sexual orientation and gender expression and identity, to ensure that gay, lesbian, bisexual and transgender Americans can be open, honest and safe at home, at work and in the community.

The National Gay and Lesbian Task Force ("NGLTF"), founded in 1973, is a membership organization that works to eliminate prejudice, violence and injusticeagainst gay, lesbian, bisexual and transgender (GLBT) people at the local, state and national level. NGLTF conducts its work through organizing in local communities, working at all levels of government to promote equitable public policies, organizing the largest annual GLBT activist conference, and producing research, policy analysis and strategies to advance equality and greater understanding of GLBT people. Sodomy laws like that in Texas represent a significant threat to GLBT families. They have been used to justify discriminatory interpretations of the law and, in many cases, to separate gay and lesbian parents from their children. NGLTF urges the repeal of all archaic sex laws to respect the privacy and dignity of same-sex couples.

Parents, Families & Friends of Lesbians & Gays, Inc. ("PFLAG") is a national, nonprofit family organization with a grassroots network of over 250,000 members and supporters and almost 500 chapters and affiliates in the United

States. Founded in 1973 by heterosexual mothers and fathers, PFLAG promotes the health and well-being of gay, lesbian, bisexual and transgendered persons, their families, and their friends, through support, education, and advocacy to promote true, full civil rights for all Americans. PFLAG's members and supporters are predominantly heterosexual. The organization seeks to create a society that is healthy and respectful of human diversity –one that encourages all people to achieve their full potential. Part of this mission includes promoting education and understanding about human sexuality and human relationships, which are important to the full development of each individual. Laws such as the Texas Homosexual Conduct Law, which criminalize private, consensual same-sex sexual behavior, prevent lesbians and gays from fully integrating their sexuality into their lives. These laws not only stigmatize those that it deems as criminals, but also cast with opprobrium their parents, families, and friends.

The National Center for Lesbian Rights ("NCLR") is a non-profit legal organization dedicated to achieving full equality for lesbians and their families. Since 1977, NCLR has advocated on behalf of individuals and couples who have been targeted for invidious discrimination because of their sexual orientation, including many who have been harmed by discriminatory sodomy statutes such as the one in this case.

Gay & Lesbian Advocates & Defenders ("GLAD") is a public interest law firm founded in 1978. GLAD's mission is to secure and advocate for the legal rights and interests of lesbians, gay men, and bisexuals, and it does so through litigation and public education in the six New England states. GLAD has considerable legal expertise in the area of civil rights and civil liberties for gay men, lesbians, and bisexuals. Throughout its nearly 25-year history, GLAD has represented individuals who have been charged with violating laws regulating intimate conduct in several states. GLAD

challenged the Massachusetts sodomy law in GLAD v. Reilly, 436 Mass. 132 (2002) as well as the Rhode Island law, State v. Lopes, 660 A.2d 707 (R.I. 1995). GLAD believes these laws impose a stigma on gay people and that persons charged under these laws face a serious risk of harm to their physical safety as well as to their professional livelihood if they are publicly identified.

The Gay & Lesbian Alliance Against Defamation ("GLAAD") is dedicated to promoting and ensuring fair, accurate and inclusive representation of individuals and events in all media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation. GLAAD is in the business of changing people's hearts and minds through what they see in the media. We know that what people watch on TV or read in their newspaper shapes how they view and treat the gay, lesbian, bisexual and transgender people around them. And we have a responsibility to make sure those images foster awareness, understanding and respect. When media images of our lives are fair, accurate and inclusive, we find ourselves increasingly welcomed into a society that respects difference. When they're not – when stereotypes and misinformation pollute the well of cultural acceptance – we become vulnerable to anti-gay forces working to create a world in which we do not exist. Because of GLAAD's work, gay and lesbian stories and issues are covered in national and local news publications, in film and on television. Negative and imbalanced portrayals of the community have decreased while lesbians and gay men have been increasingly incorporated in nearly every type of media platform. GLAAD continues to provide journalists and media professionals with timely, inclusive and authoritative resources, expanding the representation of our community one story at a time through an effective, forceful mix of advocacy, education and visibility.

Pride At Work, AFL-CIO, is a lesbian, gay, bisexual, transgender (LGBT) organization of working men and

women. Our mission is to educate the LGBT community about the benefits of union membership for LGBT workers and to bring the issues of LGBT workers to the labor movement. With an emphasis on grass roots activism, our members – currently found in 38 states – are involved in struggles against all forms of workplace discrimination, against racism, homophobia, and genderphobia in our communities, and for fair immigration policies, the right to organize, and affirmative action.

People For the American Way Foundation is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has more than 600,000 members and activists across the country, including Texas. People For regularly supports the enactment of civil rights legislation and participates in civil rights litigation, and has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of gay men and lesbians. Consistent with these efforts, People For filed an *amicus curiae* brief in this Court in support of the respondents in *Romer v. Evans*. The instant case is likewise of importance to People For because laws criminalizing consensual, private sexual conduct between two adults of the same gender have no place in our civilized society. Such laws not only violate the privacy and equal protection rights of gay men and lesbians but also have been invoked to justify anti-gay discrimination in many other contexts.

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has consistently made its

voice heard in the courts as an advocate fighting to guarantee equal treatment of all persons. In particular, ADL has filed *amicus* briefs in this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws. These include many of the Court's landmark cases in the area of civil rights and equal protection.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has a strong interest in ensuring that the Constitution is interpreted to protect against all forms of irrational discrimination.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") was founded in 1972 to protect and ensure the civil rights of Puerto Ricans and other Latinos. PRLDEF is committed to the equal protection of the laws for all persons and strongly opposes discrimination against lesbian, gay and bisexual people.

The Society of American Law Teachers ("SALT") is an association of more than 900 individual law faculty members at over 150 law schools. Founded in the early 1970s, SALT's original primary mission was to improve the quality of legal education by making it more responsive to societal concerns. That mission has expanded to include efforts to make the legal profession more inclusive, to make the legal academy more welcoming to historically underrepresented groups, including lesbians, bisexuals, gay men and transgendered individuals, and to extend the power of law to underserved individuals and communities. SALT members teach in all areas of the law and participate regularly in teaching conferences that grapple with how to address issues of race, gender, disability, and sexuality in law school courses. The Court's 1986 decision in *Bowers v. Hardwick*, and its influence on the substantive development of the law in a wide variety of substantive areas has been a central theme at many

of these conferences. SALT believes *Bowers v. Hardwick* should be explicitly overruled and that the Court should clarify its equal protection doctrine as applied to instances of discrimination on the basis of sexual orientation.

Soulforce is a national interfaith movement committed to ending discrimination and inequality perpetuated by religious policies and teachings against gay, lesbian, bisexual and transgender people. As a national organization that works for full equality for all people, regardless of sexual orientation or gender identity, we have an interest in ending sodomy laws.

The Texas Human Rights Foundation (the "Foundation") seeks to end discrimination against lesbian, gay, bisexual, and transgendered persons, and persons with HIV and AIDS, through public education, high impact litigation and legal assistance. The Foundation sponsors a hotline for Texans who have questions about their rights or need legal help because of discrimination. As part of its litigation strategy, the Foundation funded two earlier legal challenges to Texas's same-sex sodomy statute. The Foundation believes that petitioners' case presents the Court with an important opportunity finally to declare same-sex sodomy statutes unconstitutional.

The Lesbian/Gay Rights Lobby of Texas ("LGRL") works toward the elimination of social, legal, and economic discrimination based on sexual orientation through lobbying, education and research directed toward the Texas Legislature and other state governmental agencies. LGRL has advocated for the rights of gay and lesbian Texans on issues such as discrimination in the workplace and in public schools and colleges, hate crime legislation, and increase protections and services for people living with HIV.

The Stonewall Law Association of Greater Houston is a non-profit bar association founded in 1990 for the purpose of promoting human rights and, in particular, the rights of gay,

lesbian, bisexual, and transgender citizens of Texas. Its members include attorneys, law professors, law students, and local lawmakers. Many of the organization's members have been in the position of defending a gay or lesbian client's rights – in the workplace, at school, as parents – against an assault justified on the grounds that "homosexual conduct" is criminal in Texas.

Equality Alabama is a non-profit, statewide, education and advocacy organization dedicated to advancing full equality and civil rights for all the people of Alabama regardless of gender, gender identity, or sexual orientation. The fact that sexual conduct between unmarried persons is illegal in the state of Alabama is regularly used to deny child custody and visitation to LGBT (lesbian, gay, bisexual, or transgendered) parents, to deny employment to LGBT persons in private industry and state government, and to deny counseling for LGBT students in Alabama public schools. These laws are used to deny justice for LGBT citizens of Alabama.

Equality Florida is a non-profit social justice organization committed to ending discrimination based on sexual orientation, race, class and gender. Its primary focus is on issues related to sexual orientation and gender identity and expression. Equality Florida works to achieve workplace fairness and equal opportunity, safe schools for all youth, recognition and respect for our families, and an end to harassment and hate violence in our communities. Our efforts to achieve equal justice are often hampered by those who use antiquated sodomy laws to erroneously claim that to provide protections for lesbian, gay, bisexual and transgender people is to protect criminals, or to condone criminal behavior. As recently as December 2002 the sodomy argument was used to help prevent the passage of a local ordinance in Naples, Florida that would have created a Human Rights Commission which would have provided protections based on sexual orientation, among other categories.

S.A.V.E., Inc. (Safeguarding American Values for Everyone) is an organization founded in Florida in 1995 to use the political process to improve the quality of life for gay, lesbian, bisexual and transgender residents of this country. As residents of a state where sodomy is illegal, we are very interested in the outcome of this case. The ability to have consensual sex with another adult in the privacy of a private home is basic to the quality of our life that our constituents desire for themselves. Even when the law is not enforced, it is a law that appears to exist only to grant second class citizenship for our constituents.

The Community Center ("TCC") in Boise, Idaho seeks to provide inviting, safe and useful facilities to lesbian and gay groups and individuals and to further community cohesion and education. Our volunteer staff publishes Idaho's gay newspaper, "Diversity," and hosts a variety of other functions to accomplish our mission. As the only reference in the Boise phone book under "gay," TCC has been a first contact point for the lesbian and gay community in Southwest Idaho for 19 years. We are a gateway for those searching for a place to belong. Our interest in this case stems from concern about how the state government uses Idaho's "crimes against nature" law. No consistent or equal enforcement of it is evident. The state wields the act selectively, to stifle meaningful discussion of gay issues. For example, in 2000, PBS aired "It's Elementary," a documentary showing positive images of gays and lesbians. In response, the state legislature nearly eliminated all funding for PBS, using the crimes against nature law as justification by claiming PBS had advocated unlawful behavior. TCC's mission of creating community cohesion has been hobbled by the law; gays and lesbians fear what the state can do to them under the law, including possible life in prison.

Your Family, Friends, and Neighbors, Inc. ("YFFN") is a nonprofit, 501(c)(3) grass roots organizing corporation that promotes respect, understanding, and acceptance for lesbian,

gay, bisexual and transgender people. YFFN provides a voice in Idaho for gay, lesbian, bisexual, and transgendered human rights issues by exposing and reducing anti-gay hatred and violence. YFFN also opposes bigotry, violence, and discrimination against all persons. Participation in YFFN is open to all persons dedicated to developing recognition of the diversity inherent in our community, and to those who oppose organized discriminatory activities.

The Kansas Unity and Pride Alliance, Inc., is a nonprofit organization founded in 1999. It was founded on the basis that GLBT citizens in the state of Kansas deserve the same rights, privileges and responsibilities as their heterosexual counterparts. Through networking efforts with GLBT organizations and individuals from Topeka, Lawrence, Manhattan, Emporia, Wichita, Salina, and Hays, the Kansas Unity & Pride Alliance is becoming Kansas' only statewide GLBT advocacy organization working for the equal rights of all citizens. The Kansas sodomy laws have been used against us as a primary argument to exclude GLBT persons from anti-discrimination ordinances. Most recently this was the case in September of 2002 when the Topeka City Council defeated an expansion of the anti-discrimination ordinance by a 5 to 4 vote.

The Louisiana Electorate of Gays and Lesbians is a nonprofit organization formed primarily for the purpose of education on issues affecting the gay, lesbian, bisexual and transgender community. We have been the lead plaintiff in a recent attempt to overturn Louisiana's sodomy law that has been ongoing for the past seven years. Our work had resulted in an injunction preventing the enforcement of the statute as applied to consenting adults in private, but unfortunately that injunction was overturned. The sodomy law permeates all of our work and inhibits our efforts to educate the Louisiana legislature on issues of basic fairness to gay and lesbian citizens.

Equality Mississippi is a non-profit bar association founded in 2000 to conduct public policy research and further public education on the social, economic and health issues affecting lesbian, gay, bisexual and transgender (LGBT) Mississippians, and to promote and protect the equal rights of all LGBT Mississippians. We are often in the position of defending a gay or lesbian Mississippians' rights –in the workplace, at school, as parents –against an assault justified on the grounds that "unnatural intercourse" is criminal in Mississippi.

PROMO is a statewide civil rights organization with over 500 members that supports the Personal Rights of Missourians, especially civil rights for lesbians, gay men, bisexuals, and transgendered persons. PROMO was founded in 1986 as the Privacy Rights Education Project (PREP), in response to *Bowers v. Hardwick*. PROMO believes that our society is dedicated to individual liberty, pluralism, and the experience of diversity. We support the right of individuals to conduct their personal lives free from unreasonable governmental restrictions and intrusions. Since 1986, the organization has sought passage of legislation to repeal that portion of Missouri's sexual misconduct law that criminalizes sexual relations between consenting adults of the same sex. PROMO opposes laws that treat sexual relations between same-sex couples differently than sexual relations between persons of the opposite sex.

The North Carolina Gay and Lesbian Attorneys ("NC-GALA") is a non-profit bar association founded in 1994 to establish a network of attorneys and allied legal professionals who support the goal of achieving legal equality for North Carolina's gay, lesbian, bisexual and transgender citizens. NC-GALA activities include publishing a legal guide to North Carolina law, maintaining a legal referral network, conducting legal education seminars for attorneys and providing information and resources to the community. North Carolina still has a crime against nature statute that applies to

all citizens in North Carolina who are not married. Many NC-GALA members have handled cases in which the existence of this statute has had a detrimental effect on gay and lesbian clients in non-criminal areas such as custody of children, denial of professional licensing, and challenges to domestic partner benefits provided by local governments.

The Cimarron Alliance Foundation of Oklahoma is a non-profit 501(c)(3) educational foundation founded in 1997 for the purpose of supporting educational efforts that increase personal self-esteem, promote public enlightenment and advance equality for Oklahoma gays and lesbians. Many of our foundations colleagues and supporters have been in the position of defending gay and lesbian rights at many levels.

The South Carolina Gay and Lesbian Pride Movement is a (c)4 non-profit organization, which was founded in 1989 to educate our communities on gay and lesbian issues, to celebrate gay and lesbian lives, and to seek equal protection and opportunities for gay, lesbian, bisexual, and transgender South Carolinians. With our allied (c)3 non-profit foundation, the Carolina Rainbow Family Coalition, we run a Gay and Lesbian Community Center in Columbia, which offers educational and support programming. GLPM is a founding member of the South Carolina Equality Coalition, which is working to secure civil and human rights for GLBT South Carolinians. Through our Center hotline, we frequently refer people to attorneys, counselors, and other professionals when they face discrimination or stigmatization. In our advocacy on behalf of GLBT citizens in the state capitol, we repeatedly fight discriminatory legislation (most recently laws on adoption and employment policies), much of it justified by appeals to our archaic "buggery" law, which criminalizes same-sex relations and equates such relations with bestiality. Though rarely enforced, this law is repeatedly used in our state to justify discriminatory practices and climate. For example, last year when the University of South Carolina

sought to include sexual orientation in its non-discrimination policy, Lt. Governor Bob Peeler and other elected officials cited the law in their opposition to inclusion, using the law to justify continued institutional and employment discrimination.

Alliance For Full Acceptance is a non-profit organization founded in 1998 to eliminate prejudice and secure social justice and civil rights for gay, lesbian, bisexual and transgender people through education and information in South Carolina and the Southeast. Our membership includes gay, lesbian, bisexual, transgender and heterosexual persons. Our educational and media efforts inform the public sector where discrimination exists, and we provide the tools to prevent it before it occurs. Our work with policy makers/community leaders for equal treatment under the law is repeatedly hindered by state law that criminalizes homosexual conduct between consenting adults.

The Gay and Lesbian Community Center of Utah ("The Center") is a non-profit association founded in 1992 to be the information and networking center for gay, lesbian, bisexual and transgendered ("GLBT") persons. It is the primary organization in Utah serving the greater GLBT community. The Center also sponsors, and provides meeting space for, numerous programs, including Gay and Lesbian Parents of Utah. Utah has a sodomy statute, which has been used by the legislature and opponents of gay adoption to justify the Utah prohibition against adoption by cohabiting gay people in Utah.

Equality Virginia ("EV") is Virginia's state-wide gay/lesbian/bisexual/transgendered ("GLBT") advocacy organization seeking equality for all Virginians. EV seeks to eliminate discrimination against the GLBT community through lobbying the Virginia General Assembly and other government agencies, and by conducting public education campaigns concerning issues impacting Virginia's GLBT community. For more than ten years one of EV's top priori-

ties has been the repeal of the Virginia Crimes Against Nature Act, which renders criminal private, consensual, non-commercial sexual activity between either a heterosexual or same-sex couple. Virginia's sodomy law has long been and is regularly used to justify all sorts of routine discrimination against gay and lesbian Virginians, including: denying them custody and adoption rights; prohibiting them from obtaining state-funded low income housing loans; denying them equal access to healthcare benefits; and prohibiting school systems and local governments from adding sexual orientation to their respective non-discrimination policies. In each of these areas, advocates of discrimination argue that because gays and lesbians, by definition, engage in sodomy – a felony behavior under Virginia law – they are as a group felons and thereby unfit to have any of the aforementioned basic rights enjoyed by all of Virginia's non-gay citizens. EV has argued and will continue to argue that Virginia's sodomy law is unconstitutional because it is a shameful and unwarranted intrusion of the state into the most intimate and private of its citizens' affairs, and that there is no rational basis for this intrusion and no compelling government interest served by this law.

(19)

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF *AMICI CURIAE* OF MARY ROBINSON, AMNESTY INTERNATIONAL U.S.A., HUMAN RIGHTS WATCH, INTERIGHTS, THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, AND MINNESOTA ADVOCATES FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law, which criminalizes adult, consensual same-sex intimate behavior, but not identical behavior by different-sex couples – violate the Fourteenth Amendment right to equal protection of the laws?

Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

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INTEREST OF *AMICI CURIAE*

Amici curiae are an individual and five nongovernmental organizations dedicated to the promotion of freedom worldwide.[1]

Mary Robinson served as United Nations High Commissioner for Human Rights from 1997 to 2002. Previously, she served for seven years as the President of the Republic of Ireland, and for twenty years as a Senator. As a barrister, she served as counsel in *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

Amnesty International is an international human rights organization established in 1961 to promote a world in which every person enjoys the human rights enshrined in the Universal Declaration of Human Rights. Amnesty International was awarded the Nobel Peace Prize in 1977.

Human Rights Watch, the largest U.S.-based international human rights organization, was established in 1978 to report on violations of human rights worldwide.

Interights, a London-based international human rights organization, was established in 1982 to provide leadership in the legal protection of human rights worldwide.

The Lawyers Committee for Human Rights, based in New York City, has worked since 1978 in the United States and abroad to create a secure and humane world by advancing justice, dignity, and respect for the rule of law.

Minnesota Advocates for Human Rights, founded in 1983, is the largest Midwest-based non-governmental organization engaged in international human rights work.

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should not decide in a vacuum whether criminalization of same-sex sodomy between consenting adults violates constitutional guarantees of privacy and equal protection. Other nations with similar histories, legal systems, and political cultures have already answered these questions in the affirmative. Applying the same or similar constitutional terms to nearly identical fact patterns, foreign and international courts have barred the criminalization of sodomy between consenting adults. This Court should pay decent respect to these opinions of humankind. Far from ignoring parallel precedents, this Court has regularly and traditionally used international and foreign law rulings to aid its constitutional interpretation.

International and foreign court decisions have triply rejected the understanding of the right to privacy in this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). These decisions reject: (1) *Bowers' decisional theory* of privacy, which denies that sexual conduct between same-sex partners is one of the "fundamental liberties" that is "implicit in the concept of ordered liberty;" (2) *Bowers' relational theory* of privacy, which claims that "no connection [exists] between family, marriage, or procreation on the one hand, and homosexual activity, on the other;" and (3) *Bowers' zonal theory* of privacy, which claims that sexual activity between same-sex partners in the home cannot be protected without also protecting "adultery, incest, and other sexual crimes" in the home. *Id.* at 196.

Finally, international and foreign courts have invalidated same-sex sodomy laws for betraying naked prejudice and a "bare . . . desire to harm a politically unpopular group" inconsistent with this Court's equal protection reasoning in *Romer v. Evans*, 517 U.S. 620, 634 (1996) (citation and internal quotation marks omitted). International and foreign rulings demonstrate the irrationality of discriminating against some individuals who commit sodomy, but not others, based solely on their sexual orientation. By their nature, sodomy laws arbitrarily deny persons equal treatment based solely on whom they choose to love.

I. THIS COURT HAS TRADITIONALLY USED INTERNATIONAL AND FOREIGN LAW RULINGS TO AID ITS CONSTITUTIONAL INTERPRETATION

From the beginning of the Republic, the Constitution's Framers understood that the United States could not maintain its global position without paying "a decent respect to the opinions of mankind."[2] Applying this view to modern times, Justice O'Connor recently noted:

> Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.[3]

The lower court's decision rested on *Bowers v. Hardwick*, in which this Court concluded seventeen years ago that same-sex sodomy was not "implicit in the concept of ordered liberty," that no connection exists between same-sex activity and family, marriage, or procreation, and that to protect same-sex sodomy would compel the eventual legalization of adultery and incest.

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2. *See* Declaration of Independence, ¶ 1 (U.S. 1776) (emphasis added): "When in the Course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with one another . . . *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation." As Justice Blackmun noted, the concept of a "decent respect for world opinion" requires that "evolving standards of decency be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 45-46 (1994).

3. Justice Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

Bowers v. Hardwick, 478 U.S. 186, 191, 194, 196, 197 (1986). Yet as this brief demonstrates, each of these empirical conclusions has since been firmly rebutted by judicial evidence from other nations. These parallel international and foreign law rulings necessarily "cast an empirical light on the consequences of different [national] solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

Without examining these foreign precedents, the court below upheld the Texas Homosexual Conduct statute in part because it found that "homosexual conduct is not a right that is 'implicit in the concept of ordered liberty.'" *Lawrence v. State*, 41 S.W.3d 349, 361 (Tex. Crim. App. 2001) (en banc). Yet as this Court has repeatedly recognized, the very concept of "ordered liberty" is not uniquely American, but is "enshrined" in the legal history of "English-speaking peoples," including neighboring legal systems.[4] Throughout history, this Court has relied on the legal experiences of other advanced democracies to illuminate the reach of certain fundamental rights and their connection to ordered liberty.[5] Just last Term, in *Atkins v.*

4. *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)); *see also Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari) (stating that "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances" and that "[i]n doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own [Bill of Rights]").

5. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 488 n.59, 521-22 (1966) (comparing U.S. practice with that in India, Sri Lanka, and Scotland); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (delimiting notion of privacy in the home by looking to "common understanding throughout the English-speaking world"); *Quinn v. United States*, 349 U.S. 155, 167 (1955) (finding practice "supported by long-standing tradition here and in other English-speaking

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Virginia,[6] this Court looked to the opinions of "the world community" to conclude that execution of persons with mental retardation would offend civilized standards of decency.

The court below cited ancient Roman law, Blackstone, and Montesquieu to justify its ruling upholding the Texas statute in part because "Western civilization has a long history of repressing homosexual behavior by state action." *Lawrence*, 41 S.W.3d at 361. Yet in making that assertion, the court took no notice of judicial decisions from any *modern* Western civilization. In so doing, the court below ignored Chief Justice Rehnquist's 1989 admonition that "now that constitutional law is solidly grounded in so many [foreign] countries, *it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative*

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nations"); *Rochin v. California*, 342 U.S. 165, 169 (1952) (Due Process Clause obliges courts to ascertain whether laws offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples"); *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) ("[t]he safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples"); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 366 (1916) (Constitution embodies "'only relatively fundamental rules of right, as generally understood by all English-speaking communities'") (quoting *Otis v. Parker*, 187 U.S. 606, 608-09 (1902)).

6. 122 S. Ct. 2242, 2249 n.21 (2002) (Stevens, J.):

> [W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. . . . Although [factors including world opinion] are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.

See also Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (looking to global standards on execution of fifteen year-olds).

process."[7] In so suggesting, the Chief Justice merely summarized the previous practice of the members of this Court in looking to foreign practice or precedent to illuminate interpretations of the United States Constitution.[8]

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7. The Hon. William H. Rehnquist, *Constitutional Courts-Comparative Remarks (1989), reprinted in Germany and its Basic Law: Past, Present and Future – a German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (emphasis added). As the Chief Justice explained:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

Id. Cf. Raines v. Byrd, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.) (noting European law on legislative standing but declining to find it in U.S. constitutional regime); *Washington v. Glucksberg*, 521 U.S. 702, 710, 718 n.16, 785-87 (1997) (Rehnquist, C.J.) (declaring that "in almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide" and noting that "other countries are embroiled in similar debates" concerning physician-assisted suicide, citing Canadian Supreme Court, British House of Lords Select Committee, New Zealand's Parliament, Australian Senate, and Colombian Constitutional Court).

8. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing abortion decisions by West German Constitutional Court and Canadian Supreme Court); *Thompson v. Oklahoma*, 487 U.S. 815, 830, 851 (1988) (Stevens, J.) (execution of juveniles violates norms shared "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"); *id.* at 851 (O'Connor, J., concurring) (noting that U.S. had agreed by ratifying Article 68 of

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As petitioners' brief demonstrates, since *Bowers* was decided, a new national consensus against criminal sodomy laws has emerged. Given this national shift, in Justice Scalia's words:

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place

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the Geneva Convention to set a minimum age of 18 for capital punishment in certain circumstances); *Enmund v. Florida*, 458 U.S. 782, 796-797 n.22 (1982) (O'Connor, J.) (noting elimination or restriction of felony murder in England, India, Canada, and a "number of other Commonwealth countries"); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (relying on Nuremberg Military Tribunals in arguing against non-consensual medical experimentation on humans); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (Australian, Canadian, and English legislation banning anonymous campaign speech suggest that such bans need not impair democracy); *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (stating that particular detention of aliens "accords with international views" and referencing Report of U.N. Working Group on Arbitrary Detention and U.N. High Commissioner for Refugees' Guidelines on Detention of Asylum-Seekers); *Glucksberg*, 521 U.S. at 785-87 (Souter, J., concurring) (examining Dutch constitutional practice on physician-assisted suicide); *Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring) (mentioning voting systems of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe in assessing race-consciousness in U.S. voting system); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (finding Court's First Amendment jurisprudence consistent with decisions of European Court of Human Rights and Canadian Supreme Court); *Knight*, 528 U.S. at 995-98 (Breyer, J., dissenting from denial of certiorari) (finding instructive decisions of Privy Council, Supreme Court of India, Supreme Court of Zimbabwe, European Court of Human Rights, Canadian Supreme Court, and U.N. Human Rights Committee on whether lengthy delay in execution renders it inhumane).

not merely in our mores but, text permitting, in our Constitution as well.

Thompson v. Oklahoma, 487 U.S. at 868 n.4 (Scalia, J., dissenting).

The United States shares a common legal heritage, tradition, and history with many foreign constitutional systems.[9] Legal concepts like "privacy," "liberty," and "equality" are not U.S. property, but have global meaning. By construing these terms in light of foreign interpretations, this Court can use the experience of nations that share its common constitutional genealogy as laboratories to test workable social solutions to our common constitutional problems. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) (states in this nation can "serve as . . . laborator[ies]" for "social and economic experiments"). To ignore these precedents virtually ensures that this Court's ruling will generate conflict and controversies with the United States's closest global allies.

II. INTERNATIONAL AND FOREIGN LAW DECISIONS HAVE REJECTED THIS COURT'S DECISION IN *BOWERS* AS RESTING ON A TRIPLY FLAWED UNDERSTANDING OF THE RIGHT TO PRIVACY

This case presents this Court with the opportunity to overrule *Bowers v. Hardwick*, 486 U.S. 178 (1986), which held that the constitutional right to privacy does not protect adult consensual same-sex sodomy in the home. When reexamining prior holdings, the Court's "judgment is customarily informed by a series of prudential and pragmatic considerations,"

9. The U.S. Constitution served as the "principal inspiration and model" for many foreign and international constitutions and covenants. Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 405, 415 (1979). There remains to this day a "vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law." Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 540 (1988).

including "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[10]

When reexamining *Bowers*, this Court should assess "whether facts . . . have come to be seen so differently" by looking to international, as well as local, understandings. In an increasingly interdependent world, this Court's understanding of facts should be informed by the parallel understandings of peer nations. These precedents demonstrate that the *Bowers* Court misperceived key facts about same-sex sexual conduct. In particular, the *Bowers* Court held that the right to engage in same-sex sodomy fell outside three different theories of privacy—a decisional theory, a relational theory, and a zonal theory. To the contrary, the weight of international and foreign court authority establishes: first, that sexual conduct between same-sex partners involves precisely the kind of intimate decisionmaking this Court has protected under its decisional theory of privacy; second, that sexual conduct between same-sex partners falls within the kind of familial relationships this Court has protected under the relational theory; and third, that sexual conduct between same-sex partners in the home can be protected under a zonal theory without also committing courts to protect "adultery, incest, or other sexual crimes" in the home.

A. Decisional Privacy: In *Casey*, this Court observed that the privacy right protects *decisions:* "the most intimate and personal choices a person can make in a lifetime, choices central to personal dignity and autonomy." 505 U.S. at 851; *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (privacy right encompasses "the interest in independence in making certain kinds of important decisions"). Yet *Bowers* rejected the contention that adult consensual same-sex activity in the home was such an intimate or personal choice, relying instead on a relational theory of privacy that protected only the relations of "family, marriage, and procreation."

10. *Casey*, 505 U.S. at 854-55.

In stark contrast to *Bowers*, foreign and international court decisions have long held that decisional privacy protects adult consensual same-sex sexual activity. International and foreign tribunals have accepted as self-evident that decisions pertaining to sexual conduct between same-sex partners are among "the most intimate and personal choices a person can make in a lifetime." *Casey*, 505 U.S. at 851. Five years before *Bowers*, the European Court of Human Rights decided *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), *available at* http://www.echr.coe.int, which struck down laws in Northern Ireland prohibiting all sexual activity between men. Rendered by the world's most influential international human rights court, the *Dudgeon* judgment now binds all of the European continent and protects more than 800 million residents of the 44 member states of the Council of Europe.[11]

In *Dudgeon*, the European Court of Human Rights held by a 15-4 vote that laws barring male-male sexual conduct in the home violated Article 8 of the European Convention on Human Rights, which states: "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[12] The *Dudgeon* Court treated as self-evident that Dudgeon's "private life . . . includes his sexual life" and explicitly discussed that privacy right in terms of intimacy and personhood, that is, decisional privacy.[13] Since *Bowers*, the European Court of

11. Although the decision in *Bowers* turned on a single vote, "[n]o one drew the [U.S.] Supreme Court's attention to the importance of *Dudgeon* as a recent decision by the strongest international court of human rights, dealing with a closely analogous problem and having potential persuasive value." Lester, *supra* note 9, at 560. For information on the Council of Europe, see http://www.coe.int.

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 230, *available at* http://www.coe.int [hereinafter *European Convention*].

13. *Dudgeon*, 45 Eur. Ct. H.R. ¶ 41. The Court observed that the law forced Dudgeon to choose between compliance and personhood: "either he respects the law and refrains from engaging . . . in prohibited sexual acts to which he is disposed by reason of his homosexual

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Human Rights has twice reaffirmed the *Dudgeon* decision: in *Norris v. Ireland* (1988) and *Modinos v. Cyprus* (1993).[14]

In *Toonen v. Australia* (1994), the U.N. Human Rights Committee followed the *Dudgeon* Court's reasoning and rejected this Court's reasoning in *Bowers*.[15] The Committee construed Article 17 of the International Covenant on Civil and Political Rights, which applies to 149 states party with combined populations of at least three billion people. These countries

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tendencies, or he commits such acts and thereby becomes liable to criminal prosecution." *Id.* The Court found the asserted state interests insufficient to justify the "detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation." *Id.* ¶ 60.

14. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), *available at* http://www.echr.coe.int; *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993), *available at* http://www.echr.coe.int. In a recent summary of its case law on the right to respect for private life, the Court noted:

> Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (*see, for example, . . . the Dudgeon v. the United Kingdom judgment of 22 October 1981 . . .*). Article 8 also protects *a right to identity and personal development* and the right to establish and develop relationships with other human beings and the outside world.

P.G. and J.H. v. United Kingdom, App. No. 44787/98 ¶ 56 (Eur. Ct. H.R. 2001), *available at* http://www.echr.coe.int (emphasis added).

15. *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) (Hum. Rts. Comm.), *available at* http://www.unhchr.ch/tbs/doc.nsf. In *Toonen*, the Committee found unanimously that Tasmanian laws that prohibited all sexual activity between men violated Article 17's declaration that "No one shall be subjected to arbitrary or unlawful interference with his privacy." *Id.* ¶¶ 8, 9, & 10, citing International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 172, *available at* http://www.unhchr.ch/tbs/doc.nsf [hereinafter ICCPR]. In response, the Tasmanian and Australian Parliaments repealed these sodomy laws.

include the United States, which ratified the Covenant on June 8, 1992. 1676 U.N.T.S. 543.[16]

In the Council of Europe countries, *Dudgeon* has made legislative repeal mandatory since 1981.[17] In Canada, New Zealand, and Israel, legislative repeal took place in 1969, 1986, and 1988 respectively.[18]

In South Africa, common-law and statutory provisions prohibiting male-male sexual activity were unanimously struck down by the Constitutional Court, *inter alia*, under section 14 of the Constitution of 1996, which states that "everyone has the right to privacy." In *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) (*National Coalition I*),

16. In 1995, the Committee considered the initial report of the United States submitted under Article 40 of the Covenant and expressed its concern "at the serious infringement of private life" represented by U.S. sodomy statutes, in violation of Article 17 and the ruling in *Toonen*. *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/79/Add.50; A/50/40 (Oct. 30, 1995) ¶ 287, *available at* http://www.unhchr.ch/tbs/doc.nsf. No reservation or understanding qualifies the U.S. acceptance of Article 17, and the major U.S. qualification to Article 26 is an understanding that requires that laws be "rationally related to a legitimate government objective," a test which, as Part III *infra* demonstrates, the Texas sodomy law does not satisfy. 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). For this reason, *amici* also believe that *Toonen* casts doubt on the validity of the Texas sodomy law under the Supremacy Clause of the Constitution.

17. *See* Robert Wintemute, *Sexual Orientation and Human Rights* 93-95 (1997). As an observer member of the Council of Europe that has not followed *Dudgeon*, the United States stands virtually alone among its Western allies in continuing to tolerate sodomy statutes.

18. For Canada, see Criminal Law Amendment Act, 1968-69, Statutes of Canada 1968-69, ch. 38, § 7. For New Zealand, see Nigel Christie, *The New Zealand Same-Sex Marriage Case: From Aotearoa to the United Nations, in Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* 317 (Robert Wintemute & Mads Andenæs, eds. 2001). For Israel, see Aeyal Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same-Sex Couples in Israeli Law, in* Wintemute & Andenæs, *id.* at 391.

the South African Court, like the European Court of Human Rights and the U.N. Human Rights Committee, articulated a decisional theory of privacy, which encompasses an adult's intimate and private decision whether to engage in sexual conduct with a same-sex partner.[19]

In this hemisphere, the Colombian Constitutional Court has similarly underscored the need to protect sexual conduct between same-sex partners not because it occurs within a particular relationship or space, but because it relates to decisional privacy, a fundamental aspect of one's personhood.[20]

19. The South African Court observed:

> Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

1998 (12) BCLR 1517 (CC) ¶ 32, 1998 SACLR LEXIS 36.

20. *Sentencia No. C-098/96* (Corte Constitucional, 1996) (Colombia Constitutional Court), *available at* http:/bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1996/Constitucionalidad/C-098-96.htm (*unoff. trans.*).The Colombian Court reasoned:

> Sexuality, whether heterosexual or homosexual, is an essential element of humans and their psyche and, therefore, is included in the broader framework of sociability. The full constitutional protection of the individual, in the form of the rights to personality, and its free development (Colombian Constitution, Articles 14 and 16) includes in its essential core the process of autonomous assumption and decision regarding one's own sexuality. It would be senseless if sexual self-determination were to remain outside the limits of the rights to personality, and its free development, given that identity and sexual conduct occupy in the development of the person and in the unfolding of his liberty and autonomy such a central and decisive place.

Id. ¶ 4.

B. Relational Privacy: *Bowers* further stated that "no connection between family, marriage, or procreation on the one hand, and homosexual activity, on the other, has been demonstrated." 486 U.S. at 191. Yet the European Court of Human Rights, the U.N. Human Rights Committee, and several national constitutional courts have found adult consensual same-sex sexual activity to be protected by the right to privacy even if no connection can be established to "family, marriage, or procreation." Even if such a connection were necessary, tribunals in countries as disparate as South Africa, the United Kingdom, Canada, and Israel have repeatedly challenged *Bowers'* claim by recognizing that there can be a familial dimension to same-sex relationships.

In 1999, the Constitutional Court of South Africa held 11-0 that South Africa could not allow married different-sex partners of permanent residents to immigrate while threatening to deport unmarried same-sex partners of permanent residents.[21] In so holding, the court underscored that recognition of the familial dimension of same-sex partnerships was a global trend, citing Canadian, Israeli, and British authorities.[22] The court stated that gays and lesbians are "capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships," and "of constituting a family, whether nuclear or extended, and of establishing, enjoying, and benefiting from family life." *Id.* ¶ 53.

The highest appellate court of the United Kingdom has also recognized that there can be a familial aspect to same-sex relationships. In *Fitzpatrick v. Sterling Housing Association Ltd.*

21. *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (1999) (*National Coalition II*), 2000 (1) BCLR 39 (CC), *available at* http://www.concourt.gov.za/judgments/1999/natcoal.pdf.

22. *Id.* ¶ 48. The Court reasoned that "[i]n other countries a significant change in societal and legal attitudes to same-sex partnerships in the context of what is considered to constitute a family has occurred. . . . [T]hese judgments . . . give clear expression to the growing concern for, understanding of, and sensitivity towards . . . gays and lesbians and their relationships. . . ." *Id.*

(1999), the House of Lords held that a man's eighteen-year monogamous same-sex relationship with a deceased tenant qualified him as a "family member" statutorily protected against eviction. [1999] 3 W.L.R. 1113 (H.L.). Lord Clyde observed that "the concept of 'family' is now to be regarded as extending to a homosexual partnership." *Id.* at 1136. Lord Slynn agreed that "two people of the same sex can be regarded as having established membership of a family, one of the most significant of human relationships which both gives benefits and imposes obligations." *Id.* at 1124. Similarly, in *Chamberlain v. Surrey School District No. 36* (2002), the Canadian Supreme Court held 7-2 that a school board acted unreasonably in refusing to approve for classroom use children's books depicting families in which both parents were of the same sex.[23]

Finally, in *El-Al Israel Airlines v. Danilowitz* (1994), the Supreme Court of Israel rejected *Bowers*' claim that there is no evidence of a "connection between family . . . and homosexual activity." *Bowers*, 486 U.S. at 191. Chief Justice Barak observed that the distinction between same-sex and different-sex partners was "not at all relevant to the issue before us," asking how "living together for persons of the same sex [was] different, with regard to the relationship of sharing and harmony and running the social unit, from this life of sharing for heterosexual couples?" *Danilowitz*, 48(5) P.D. 749 ¶ 15 (1994), *available at* http://62.90.71.124/mishpat/html/en/verdict/ElAl.pdf.

C. Zonal Privacy: Finally, this Court has long asserted a zonal theory of privacy that gives heightened protection to activities that occur within the home. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969). *Bowers* anomalously rejected the claim that such a zonal theory would protect adult consensual

23. 2002 Can. Sup. Ct. LEXIS 97 (Dec. 20, 2002). Noting that the children in the district came "from many different types of families"—including "traditional families," "single-parent families," "interracial families," and "same-sex parented families"—the court held that the school could not exclude books representing such families from the curriculum based solely "on the ground that one group of parents finds them morally questionable." *Id.* ¶ 20.

same-sex sexual activity in the home, stating that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195-96. Yet since *Bowers*, international and foreign precedents have resoundingly demonstrated that recognizing the right of consenting adults to engage in non-commercial sexual activity in the home in no way commits this or any other court to protect "adultery, incest, or other sexual crimes." Other courts have easily negotiated this slippery slope by using the principles of harm, consent, and commerce to qualify the zonal protection of privacy.

These three limiting principles can be found in the jurisprudence of the European Court of Human Rights. In *Laskey, Jaggard & Brown v. United Kingdom*, 24 Eur. H.R. Rep. 39 (1997), *available at* 1997 WL 1104639 (1997), the Court emphasized the harm principle in declining to extend *Dudgeon* to protect consensual, sado-masochistic sexual activity in the home. The *Laskey* Court stressed "that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8" privacy.[24]

The European Court has also emphasized that privacy protections extend only to acts among consenting adults. In *Dudgeon* itself, the Court acknowledged that "some degree of regulation of male homosexual conduct" by the criminal law was justified—even with respect to consensual acts committed in private—"to provide sufficient safeguards against exploitation

24. The European Court of Human Rights has had no occasion to apply this harm principle to the case of adultery for the simple reason that in Council of Europe countries, adultery among consenting adults is rarely, if ever, a criminal offense, as opposed to a ground for divorce. *See Tyler v. United Kingdom* (App. No. 21283/93) (1994) (Eur. Comm'n H.R.), *available at* http://www.echr.coe.int (observing in a disciplinary case against a Church of England priest that "adultery . . . commonly is not criminal in member states of the Council of Europe"). *Cf. Bowers*, 478 U.S. at 209 n.4 (Blackmun, J., dissenting) (using analogous harm principle to distinguish same-sex sodomy from adultery).

and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[25] This limiting principle would withhold legal protection from ostensibly consensual incest or child molestation in the home.[26] The European Commission of Human Rights has also withheld the protection of Article 8 privacy from commercial sexual conduct, even if it occurs in the home.[27]

25. *Dudgeon*, 45 Eur. Ct. H.R. ¶ 49 (citations and internal quotation marks omitted). The South African Constitutional Court has similarly stated that it is

> not aware of any jurisdiction which, when decriminalising private consensual sex between adult males, has not retained or simultaneously created an offence which continues to criminalise sexual relations [including sodomy] even when they occur in private, where such occur without consent or where one partner is under the age of consent.

National Coalition for Gay and Lesbian Equality v. Minister of Justice (1998) (*National Coalition I*), 1998 (12) BCL 1517 (CC) ¶ 66, *available at* 1998 SACLR LEXIS 36.

26. Since *Dudgeon*, no European cases have been brought challenging a prosecution for consensual incest as a violation of Article 8's privacy provision. Most prosecutions for incest involve sexual activity between a parent and a child who did not consent or is below the age of consent, acts that would be criminal even if the parties were not related. *See, e.g., R. v. United Kingdom* (App. No. 15396/89) (1991) (Eur. Comm'n H.R.), *available at* http://www.echr.coe.int; *H.S. v. Sweden* (App. No. 20708/92) (1994) (Eur. Comm'n H.R.). *Cf. Bowers*, 478 U.S. at 209 n.4 (Blackmun, J., dissenting) (using analogous consent principle to distinguish same-sex sodomy from incest).

27. In *F. v. Switzerland*, the Commission held "that sexual relations which, as here, resulted from a wish for remuneration and were engaged in professionally amounted to prostitution and do not belong to the sphere of private life protected by Article 8 ¶ 1 of the Convention." App. No. 11680/85), 55 Eur. Comm'n H.R. Dec. & Rep. 178 (1988). Similarly, the South African Constitutional Court unanimously held in *Jordan v. State* (2002) that a criminal prohibition of prostitution, which would apply even in the home, was a justifiable limitation of the constitutional right to privacy. 2002 (11) BCLR 1117 (CC), *available at* http://www.concourt.gov.za.

In sum, *Bowers* falsely predicted that courts could not draw principled distinctions among various forms of protected and unprotected sexual activity in the home. Since *Bowers*, the "empirical light" cast by foreign precedents plainly illuminates the principled distinctions that can be drawn within a zonal conception of privacy.

III. INTERNATIONAL AND FOREIGN COURT DECISIONS HAVE INVALIDATED SODOMY LAWS FOR EXPRESSING AN IRRATIONAL ANIMUS AND PREJUDICE THAT DENIES A POLITICALLY UNPOPULAR GROUP EQUAL TREATMENT

Sodomy laws target and punish a single group in our society for their intimate decision to love members of their own sex. In *Romer v. Evans*, 517 U.S. 620 (1996), this Court struck down a Colorado constitutional amendment forbidding legal protection of sexual conduct between same-sex partners, in part, because the law "impos[ed] a broad and undifferentiated disability on a single named group." *Id.* at 632. Unlike *Bowers*, *Romer* recognized an obvious truth: that rank prejudice can never be a legitimate governmental interest.

Two independent principles of international and foreign law support invalidating Texas's sodomy law. First, as in *Romer*, Texas's justifications for its sodomy law express irrational animus and prejudice. Second, international and foreign law recognize sodomy laws as impermissible discrimination based on sexual orientation, which violates fundamental global principles of equal treatment.

A. Irrational Animus and Prejudice: International and foreign court decisions demonstrate that sodomy laws are motivated by the very state interests that *Romer* forbade: "a bare . . . desire to harm a politically unpopular group [which] cannot constitute a *legitimate* governmental interest." 517 U.S. 620, 634 (1996) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original). Moreover, rulings in international and foreign jurisdictions clearly show

that same-sex sodomy laws function arbitrarily to make "a class of people a stranger to [the] law[]."[28]

Sodomy laws prohibit conduct that "causes no harm to anyone else." *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 26. For that reason, the Constitutional Court of South Africa facially invalidated South Africa's sodomy laws, finding that: "The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate [government] purpose." *Id.* ¶ 37.

In *Dudgeon*, the European Court of Human Rights echoed this Court's opinion in *Romer*, declaring: "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed" by private sexual conduct between same-sex partners, "this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[29] Similarly, the Constitutional Court of Colombia powerfully rejected judicial enforcement of societal prejudice against homosexuals: "The Court does not believe that the democratic principle may in truth support a majority

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28. *Id.* at 635. At bottom, sodomy laws are like "laws of the kind [that were before this Court in *Romer*, which] raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

29. *Dudgeon*, 45 Eur. Ct. H.R. ¶ 60; *see also S.L. v. Austria*, App. No. 445330/99 ¶ 44 (Eur. Ct. H.R. Jan. 9, 2003)

> To the extent that [the Austrian law in question] embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered . . . sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.

(citing *Smith and Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 ¶ 97 (1999)).

consensus that relegates homosexuals to the level of second class citizenship."[30]

International and foreign authorities demonstrate that sodomy laws mark gays and lesbians as a class of outlaws, scapegoat them as a group, and foster discrimination by building barriers to their equal treatment in domains unrelated to the criminal law. The South African Constitutional Court explained that a same-sex sodomy law "state[s] that in the eyes of our legal system all gay men are criminals." *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 28. The South African Court graphically compared the effect of sodomy laws to the laws of the apartheid era the country had just escaped: "Just as apartheid legislation rendered the lives of couples in different racial groups perpetually at risk, the sodomy offense builds insecurity and vulnerability into the daily lives of gay men." *Id.*

International and foreign bodies have also recognized that sodomy laws generate widespread discrimination against gays and lesbians in other areas of life. The U.N. Human Rights Committee has criticized U.S. sodomy laws due to "the serious infringement of private life . . . and the consequences thereof for their enjoyment of other human rights without discrimination."[31] These consequences involve discrimination

30. *Sentencia No. C-098/96* (Corte Constitucional, 1996) (Colombia Constitutional Court), ¶ 4.1, *available at* http://bib.minjusticia.gov.co/ jurisprudencia/CorteConstitucional/1996/Constitucionalidad/C-098-96.htm (*unoff. trans.*) (emphasis added). The Court went on to say:

> The principle of equality (Constitution, article 13) is radically opposed, to the subjugation by legal means, for reasons of a sexual nature, of a minority that does not share the sexual likes, habits and practices of the majority. Prejudices, whether phobic or not, and false beliefs that have historically served to anathem[a]tize homosexuals, do not confer legitimacy on laws that convert homosexuals into the object of public scorn.

Id.

31. *Human Rights Committee: United States*, *supra* note 16, (Cont'd)

in other areas of law and in social and civic life. According to the South African Court, sodomy laws obstruct legal equality for gays and lesbians in domains unrelated to the criminal law, because such laws "'entrench[] stigma and encourag[e] discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation.'"[32] The European Court of Human Rights similarly recognized that "one of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public."[33]

B. Equal Treatment: Reflecting an emerging global movement, international treaty bodies and foreign court decisions have correctly viewed same-sex sodomy laws as impermissible discrimination. These decisions have recognized the irrationality of criminally punishing some individuals who commit sodomy, but not others, based solely on their sexual orientation.[34]

(Cont'd)
¶ 287; *see also Concluding Observations of the Human Rights Committee: Chile*, U.N. Doc. CCPR/C/79/add.104 (Mar. 30, 1999) ¶ 20, *available at* http://www.unhchr.ch/tbs/doc.nsf. Similarly, the Constitutional Court of South Africa stated that the maintenance of sodomy laws "radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays." *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 36.

32. 1998 (12) BCLR 1517 (CC) ¶ 23 (quoting Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. Af. L.J. 450, 455 (1993)).

33. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) ¶ 21 (1988) (citation and internal quotation marks omitted).

34. In analyzing a law that criminalized certain sexual acts between men, the South African Court put it well:

> There being no similar provision in relation to acts by women with women, or acts by men with women or by women with men, *the discrimination is based on sexual orientation and therefore presumed to be unfair.* The impact

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The U.N. Human Rights Committee has repeatedly concluded that laws criminalizing same-sex sodomy constitute discrimination based on sexual orientation.[35] The U.N. Committee on Torture[36] and the U.N. Working Group on Arbitrary Detention condemned Egypt's gender-neutral "debauchery" law as constituting discrimination on the basis of sexual orientation.[37] Similarly, the U.N. Committee on the Rights of the Child has analyzed disparities in age-of-consent laws between same and different-sex partners as sexual orientation discrimination.[38] Guidelines promulgated by the U.N. High Commissioner for Refugees further recognize that laws criminalizing homosexual conduct may, if the penalty is severe, constitute persecution on the ground of sexual orientation.[39]

(Cont'd)

> intended and caused by the provision is flagrant, intense, demeaning and destructive of self-realisation, sexual expression and sexual orientation.

National Coalition I, 1998 (12) BCLR 1517 (CC) ¶ 76 (emphasis added).

35. *Human Rights Committee: United States*, *supra* note 16, ¶ 287; *Concluding Observations of the Human Rights Committee: Cyprus*, UN Doc. CCPR/c/79/Add.88 (Apr. 6, 1998) ¶ 11, *available at* http://www.unhchr.ch/tbs/doc/nsf; *Human Rights Committee: Chile*, *supra* note 31, ¶ 20.

36. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 113, *available at* http://www.unhchr.ch/tbs/doc.nsf.

37. *Concluding Observations of the Committee Against Torture: Egypt*, U.N. Doc. CAT/s/XXIX/Misc. 4 (Nov. 20, 2002) ¶ 5(e), *available at* http://www.unhchr.ch/tbs/doc.nsf; Working Group on Arbitrary Detention Opinion No. 7/2002 (Egypt) (Sept. 3, 2001) at 5-6.

38. *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/15/Add.134 (Oct. 16, 2000) ¶ 22, *available at* http://www.unhchr.ch/tbs/doc.nsf.

39. *Guidelines on International Protection, Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/ 02/01 (May 7, 2002) ¶¶ 16-17, *available at* http://www.unhchr.ch/tbs/doc.nsf.

These views have been echoed by the constitutional courts of South Africa[40] and Ecuador,[41] which have also treated various national laws infringing gay rights as discrimination based on sexual orientation.

These rulings regarding sodomy laws stand atop a much larger global human rights trend calling for equal treatment of persons without regard to their sexual orientation. Virtually every international human rights treaty and every democratic country's constitution contain provisions guaranteeing the right to equal protection of the laws. Since the 1970s, international and foreign courts have increasingly come to recognize that these provisions bar discrimination based not only on race, sex, and religion, but sexual orientation as well. In addition, both international courts and treaty bodies have ruled that various treaties' equal protection provisions cover sexual-orientation discrimination.

International courts and treaty bodies have construed the equal treatment provisions of almost every major international human rights treaty to ban discrimination based on sexual orientation. In 1999, the European Court interpreted Article 14 of the European Convention on Human Rights, which provides: "[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground . . ." to proscribe discrimination based on sexual

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40. *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 76.

41. The Constitutional Court of Ecuador also invalidated a sodomy law as a violation of equality:

> Homosexuals are, above all, bearers of all the rights of the human person and thus have the right to exercise them in conditions of full equality, which does not imply the absolute identity but rather a proportional equivalence between two or more beings, that is, their rights to enjoy legal protection, whenever in the manifestation of their conduct they do not infringe the rights of others just as is the case with all other persons.

Constitutional Tribunal, Ecuador, Sentencia No. 111-97-TC, Registro Oficial (Official Registry), Supp., No. 203, Nov. 27, 1997, at 6, 7.

orientation.[42] Recently, the fifteen member states of the European Union included sexual orientation as an impermissible ground of discrimination in two international instruments.[43]

Similarly, five of the six major U.N. human rights treaties have been interpreted by their respective supervisory organs to cover sexual orientation discrimination.[44] In *Toonen v. Australia*, the U.N. Human Rights Committee construed Article 26 of the International Covenant on Civil and Political Rights (ICCPR) to require that states party "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, . . . religion, . . . national . . . origin, . . . or other status," to include a protection against discrimination on the basis of sexual orientation.[45] In reviewing state periodic reports under the International Convention Against Torture, to which the United States is also a party, the U.N. Committee on

42. In *Mouta v. Portugal*, the Court found that a national tribunal's custody decision, based primarily on the applicant's sexual orientation and practice of living with another man, violated Article 14 (and Article 8 ("respect for . . . family life")) of the European Convention on Human Rights. [2001] 1 FCR 653 (Eur. Ct. H.R. 1999).

43. On October 2, 1997, the fifteen Member States of the European Union/Community signed the Treaty of Amsterdam, which inserted a new Article 13 into the Treaty Establishing the European Community, O.J. (C 340) 173 (1997), *available at* http://europa.eu.int/eur-lex/en/treaties/index.html (consolidated version). Article 13 authorizes the Council of the European Union to take "appropriate action to combat discrimination based on . . . sexual orientation." On December 7, 2000, the fifteen Member States authorized the solemn proclamation of the Charter of Fundamental Rights of the European Union, which in Article 21(1) provides that discrimination shall be prohibited on grounds "such as . . . sexual orientation . . . ." 2000 O.J. (c 364) 1 (2000), *available at* http://www.europarl.eu.int/charter/pdf/text_en.pdf.

44. The sixth treaty is specifically directed to racial discrimination. *See* International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966).

45. Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) ¶ 8.7, *available at* http://www.unhchr.ch/tbs/doc.nsf.

Torture has criticized states for prison conditions that discriminate and persecute based on sexual orientation.[46] Similar interpretations have been rendered with regard to three other conventions to which the United States is a signatory[47]: the International Covenant on Economic, Social and Cultural Rights,[48] the Convention for the Elimination of All Forms of Discrimination against Women,[49] and the Convention on the Rights of the Child.[50]

46. *See Concluding Observations of the Committee against Torture: Brazil*, U.N. Doc. CAT/A/56/44 (May 16, 2001) ¶ 119, *available at* http://www.unhchr.ch/tbs/doc.nsf; *Committee against Torture: Egypt*, *supra* note 37.

47. When a state has signed, but not ratified a treaty, it is obliged under international law not to act in a manner that would defeat the object and purpose of that treaty. *See Restatement (Third) of the Foreign Relations Law of the United States* §§ 312(3) (1987) ("*Restatement (Third)*").

48. In a general statement of interpretation concerning health care, the U.N. Committee on Economic, Social and Cultural Rights declared that Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (which requires states "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, . . . or other status") proscribes discrimination on the basis of sexual orientation. *CESCR General Comment No. 14*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) ¶ 18, *available at* http://www.unhchr.ch/ tbs/doc.nsf.

49. The U.N. Committee on the Elimination of Discrimination Against Women has called for the removal of criminal laws against lesbianism and commended protections afforded to individuals with a well-founded fear of persecution on the basis of sexual orientation. *Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Kyrgyzstan*, U.N. Doc. CEDAW/A/54/38 (Jan. 27, 1999) ¶¶ 127-28, *available at* http://www.unhchr.ch/tbs/doc.nsf; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Sweden*, U.N. Doc. CEDAW/A/56/38 (July 31, 2001) ¶ 334, *available at* http://www.unhchr.ch/tbs/doc.nsf.

50. Article 2 of the Convention on the Rights of the Child contains a similar equality provision, which the Committee on the Rights of the

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Less than three years ago, a U.S. Ambassador told the U.N. Commission on Human Rights:

> Nothing in international law can justify the persecution of individuals on the basis of sexual orientation. In fact, both the UDHR [Universal Declaration of Human Rights] and the ICCPR prohibit discrimination without distinction of any kind. No nation, including my own, is perfect, nor is any immune from legitimate criticism of its efforts to ensure non-discriminatory treatment of individuals on the basis of sexual orientation.[51]

Article 2 of the Universal Declaration of Human Rights, which has been widely accepted as reflective of customary international law, has been interpreted to apply to sexual orientation discrimination.[52] Moreover, the U.S. government, in accord with the U.N. High Commissioner for Refugees, has concluded that persecution based on sexual orientation is a legitimate ground for claiming refugee status under the International Refugee

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Child has interpreted to apply to sexual orientation discrimination. *Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland*, *supra* note 38.

51. Statement of Ambassador Nancy Rubin on Protection of Vulnerable Groups, Before United Nations Commission on Human Rights, April 11, 2000, *available at* http://www.humanrights-usa.net/2000/item14.html.

52. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948), *available at* http://www.unhchr.ch/tbs/doc.nsf ("Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, . . . or other status."); *Restatement (Third)*, *supra* note 47, § 701 n.4; *see, e.g.*, Working Group on Arbitrary Detention Opinion No. 7/2002 (Egypt), *supra* note 37, at 5-6; *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (International law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

Convention and Protocol and U.S. immigration laws.[53] In addition, several U.N. Special Rapporteurs and a Special Representative to the U.N. Secretary-General now explicitly consider prevention of discrimination based on sexual orientation to be part of their respective mandates.[54]

Constitutional courts in Canada,[55] Israel,[56] Colombia[57] and

53. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990), Att'y. Gen. Order No. 1895-94, June 19, 1994; *Guidelines on International Protection, Gender-Related Persecution*, *supra* note 39.

54. *See, e.g.*, Report of the Special Rapporteur on the Independence of Judges and Lawyers, U.N. Comm. on Hum. Rts., 58th Sess., U.N. Doc. E/CN.4/2002/72 (Feb. 11, 2002), *available at* http://www.unhchr.ch/ tbs/doc.nsf; Report of the Special Rapporteur on Torture, U.N. Comm. on Hum. Rts., 58th Sess., U.N. Doc. E/CN.4/2002/76 (Dec. 27, 2001), *available at* http://www.unhchr.ch/tbs/doc.nsf; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Comm. on Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/1999/39 (Jan. 6, 1999), *available at* http://www.unhchr.ch/tbs/doc.nsf; Report of the Special Representative on Human Rights Defenders, U.N. Comm. on Hum. Rts., 57th Sess., U.N. Doc. E/CN.4/2001/94 (Jan. 26, 2001), *available at* http://www.unhchr.ch/tbs/doc.nsf.

55. The Supreme Court of Canada has held that the Canadian Charter of Rights and Freedoms proscribes discrimination on the basis of sexual orientation. In *Egan v. Canada*, [1995] 2 S.C.R. 513, 603, *available at* 1995 S.C.R. LEXIS 375, the Court noted that "judicial opinion has overwhelmingly recognized that sexual orientation is an analogous ground" to those enumerated in Section 15(1), which provides: "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canadian Charter of Rights and Freedoms, Section 15, www.efc.ca/pages/laws/charter/charter.head.html. *See also Vriend v. Alberta*, [1998] 1 S.C.R. 493, *available at* 1998 S.C.R. LEXIS 76 (Section 15 requires that sexual orientation be "read into" a province's general anti-discrimination law).

56. In *Danilowitz*, 48(5) P.D. 749 ¶ 17 (1994), the Israeli Court held that the state airline's policy of extending certain employee benefits to different-sex but not same-sex couples violated the constitutional guarantee of equality: "This discrimination—against homosexuals and lesbians—is improper. It is contrary to equality."

(Cont'd)

Ecuador[58] have recognized that the fundamental principles of equality extend to sexual orientation discrimination, reading constitutional equal protection provisions implicitly to prohibit discrimination based on sexual orientation. Following these global trends, several nations drafting new constitutions—including South Africa,[59] Fiji,[60] Ecuador,[61] and Switzerland[62]—have adopted language that effectively bars sexual orientation discrimination in their equal protection clauses. Finally, sexual orientation has been added as a ground to national legislation

57. The Constitutional Court of Colombia has held that the Colombian Constitution's equality provision implicitly includes sexual orientation: "[T]he establishment of legal norms that tend to affect the free exercise of sexuality, disregards the principle of substantive equality, which, in accordance with Article 13 of the Constitution, imposes on the State the duty to promote conditions conducive to real, effective equality of treatment. . . ." *Sentencia C-507/99* (Corte Constitucional, 1999) (Colombia Constitutional Court), ¶ 5.4, *available at* http://bib.minjusticia. gov.co/jurisprudencia/CorteConstitucional/1999/Constitucionalidad/C-507-99.htm (*unoff. trans.*).

58. *See* Constitutional Tribunal, Ecuador, Sentencia No. 111-97-TC, Registro Oficial (Official Registry), Supp., No. 203, Nov. 27, 1997, at 6-8 (decided before Ecuador explicitly included sexual orientation in the equality provision of its new constitution).

59. The Constitution of South Africa provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, . . . colour, sexual orientation, . . . religion . . ." S. Afr. Const. (Act 108 of 1996), ch. 2 (Bill of Rights), 9(3), *available at* http://www.concourt.gov.za/constitution/index.html.

60. *See* Fiji Const. (Constitution Act, 1997 (Amended, 1999)), sec. 38(2), *available at* http://www.oefre.unibe.ch/law/icl/fj00000_html#5038.

61. Constitución de 1998 [Constitution] art. 23, § 3 (Ecuador), *available at* http://www.georgetown.edu/pdba/Constitutions/Ecuador/ecuador98.html.

62. In 1999, Switzerland adopted a new Federal Constitution that included a prohibition on discrimination based on the broader ground of "way of life." Bundesverfassung [BV] [Constitution], art. 8(2) (Switzerland), *available at* http://www.oefre.unibe.ch/law/icl/sz00t__.html.

prohibiting discrimination in such areas as employment, education, health care, housing, or the provision of services both in the public and private sector in Europe, Canada, Australia, Israel, New Zealand, South Africa, Costa Rica, and Namibia.[63]

CONCLUSION

Punishing people for whom they love is simple injustice, which offends our national concept of "ordered liberty." In striking down South Africa's sodomy laws, Justice Albie Sachs declared: "Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the [national] community."[64]

The United States is not the world's only civilized society. In a globalizing world, it would be folly to ignore foreign practice and precedent at a time when courts across the world are "increasingly caught up in a process of cross-fertilization among legal systems."[65] This Court cannot disregard the rest of the

63. Among the 44 Member States of the Council of Europe, 15 Member States have passed legislation prohibiting sexual orientation discrimination in at least one such area. Seven more Member States must do so by December 2, 2003, to comply with Council Directive 2000/78/EC. The Directive was adopted on Nov. 27, 2000 under Article 13 of the European Community Treaty, and prohibits sexual orientation discrimination in public and private employment. In Canada, "sexual orientation" appears in antidiscrimination legislation at the federal level, in nine of ten provinces, and in two of three territories. In Australia, "sexual orientation" or a similar term appears in the legislation of all six states and both territories. The same is true for at least one of the areas listed in text at the national level in Israel, New Zealand, South Africa, Costa Rica, and Namibia. *See Legal Recognition of Same-Sex Partnerships* 782-87 (Robert Wintemute & Mads Andenæs eds., 2001).

64. *National Coalition I,* 1998 (12) BCLR 1517 (CC) ¶ 107 (Sachs, J., concurring).

65. Mary Ann Glendon, *Rights Talk* 158 (1991) (citing Europe, Australia, Canada, and New Zealand).

civilized world in addressing the privacy and equality issues raised by this case. Left undisturbed, the lower court's parochial analysis will undermine U.S. influence in the global development of human rights and compromise the United States' reputation as "the world's foremost protector of liberties." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting).

For the foregoing reasons, the judgment of the Texas Court of Criminal Appeals affirming the convictions of Lawrence and Garner should be reversed.

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, NATIONAL MENTAL HEALTH ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AIDS ACTION, NATIONAL ALLIANCE OF STATE AND TERRITORIAL AIDS DIRECTORS, ASSOCIATION OF NURSES IN AIDS CARE, NATIONAL MINORITY AIDS COUNCIL, AND THE WHITMAN-WALKER CLINIC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are organizations dedicated to public health and to supporting scientifically valid research on physical and mental health issues. Nearly all are national in scope and several have a particular focus on reducing the incidence of HIV infection through prevention and education efforts. *Amici*, based on their expertise, each reject the notion that criminalization of adult consensual private sexual activity is beneficial to public health. To the contrary, *amici* believe that sodomy laws like the Texas Homosexual Conduct Law actually undermine HIV/AIDS prevention efforts and harm the mental and physical health of lesbians and gay men. *Amici* submit this brief to refute the "public health" assertions advanced by *amicus* Pro Family Law Center in its brief opposing *certiorari* and to provide the Court with accurate scientific information concerning the adverse public health implications of the Homosexual Conduct Law.[1]

The American Public Health Association ("APHA") is devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the world's largest health organization, with over 50,000 affiliated members from all disciplines and specialties in public health.

Established in 1909, the National Mental Health Association ("NMHA") is the country's oldest and largest nonprofit organization addressing all aspects of mental health and mental illness. NMHA is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and service.

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no outside person or entity made a monetary contribution to the preparation or submission of this brief.

The American Orthopsychiatric Association, founded in 1924, provides a common ground for collaborative study, research, and knowledge exchange among individuals from a variety of disciplines engaged in preventive, treatment, and advocacy approaches to mental health.

Founded in 1984, AIDS Action is a network of 3,200 AIDS service organizations across the country and the one million HIV-positive Americans they serve. AIDS Action is solely dedicated to responsible federal policy for improved HIV/AIDS care and services, vigorous medical research, and effective prevention.

The National Alliance of State and Territorial AIDS Directors ("NASTAD") is a nonprofit national association of state health department directors with responsibility for administering government-funded HIV/AIDS health care, prevention, education, and supportive services. Founded in 1992, NASTAD is dedicated to reducing the incidence of HIV infection in the United States and its territories; providing comprehensive, compassionate, and quality care to all persons living with HIV/AIDS; and the development of responsible and compassionate public AIDS policies.

The National Minority AIDS Council, established in 1987, is the premier national organization dedicated to developing leadership within communities of color to address the challenges of HIV/AIDS and promoting sound national HIV/AIDS, health, and social policies that are responsive to the needs of the diverse communities of color impacted by HIV/AIDS.

The Association of Nurses in AIDS Care is a nonprofit professional nursing organization committed to fostering the individual and collective professional development of nurses involved in the delivery of health care to persons infected or affected by HIV and to promoting the health, welfare, and rights of all HIV infected persons.

Whitman-Walker Clinic is a nonprofit community-based health clinic serving the Washington D.C. metropolitan region. Founded in the 1970s as a gay and lesbian health

clinic, Whitman-Walker has become a principal provider of medical and support services to all persons with HIV/AIDS, regardless of sexual orientation, in the Capitol area.

SUMMARY OF THE ARGUMENT

The State of Texas has never defended the constitutionality of the Homosexual Conduct Law, Tex. Penal Code Ann. § 21.06 (Vernon 1994), based on any public health interest. *Amicus* Pro Family Life Center ("PFLC") nevertheless argues that Texas's criminalization of sodomy by gay men or lesbians, but not by heterosexuals, is justified by public health considerations. (Brief of *Amicus Curiae* Pro Family Law Center in Support of Denying Review ("PFLC Br."), dated August 16, 2002). According to PFLC, "[t]he greater public health consequences of same-sex sodomy provide a rational basis for discrimination against such conduct." (PFLC Br. at 2). Focusing on Acquired Immune Deficiency Syndrome (AIDS), PFLC asserts that sodomy laws applying only to same-sex couples are "good and necessary" to "regulate conduct which can result in disease and death." (*Id.*)

The State's decision not to adopt the purported justification suggested by PFLC is entirely appropriate, first, because the legislative history belies any public health rationale for the law. The Homosexual Conduct Law was adopted well before the first known diagnosis of AIDS, and a subsequent attempt to increase its penalties specifically to address that disease was rejected by the legislature. In light of the State's failure to invoke any public health rationale for the law, the Court should not even entertain this theory.

Moreover, an objective evaluation of medical science concerning the transmission of Human Immunodeficiency Virus (HIV), the virus that causes AIDS, vitiates any argument that the Homosexual Conduct Law is rationally related to preventing the disease. The law, which is at once both egregiously over and underinclusive as a means of preventing the spread of HIV, is so far removed from this purported public health objective that it would be

impossible to credit preventing AIDS as its legitimate legislative purpose, even if the State so claimed.

HIV may be transmitted by an infected person during certain forms of unprotected sexual activity, regardless of the sex of the partners. Yet the Homosexual Conduct Law criminalizes a wide range of sexual activity – and only between members of the same sex – without regard to the science of AIDS transmission. Accordingly, the law bans conduct unlikely to result in HIV transmission while simultaneously doing nothing to discourage other behavior that carries significant risk. For example, although an HIV-positive man who engages in unprotected vaginal intercourse with numerous women is vastly more likely to transmit HIV than an infected gay man in a monogamous same-sex relationship who engages in protected sex with his partner, the law prohibits only the latter activity. The Homosexual Conduct Law also criminalizes sex between two women, which presents virtually no risk of HIV transmission. The law even bans sexual activity between same-sex couples where neither partner is infected with HIV and transmission is thus medically impossible. The disparity between the law's scope and the way in which HIV is actually transmitted renders the Homosexual Conduct Law irrational as a means of serving this purported public health goal.

Not only is the law not rationally related to reducing the spread of AIDS, it has the actual effect of undermining public health. Objective social science research demonstrates that the law reduces the effectiveness of legitimate AIDS prevention strategies, impeding efforts to eradicate the disease. Moreover, the Homosexual Conduct Law, like sodomy laws generally, inflicts significant mental and physical harm on lesbians and gay men. Far from legitimizing this flawed law, an objective assessment of public health interests confirms the absence of any rational basis to sustain it.

ARGUMENT

POINT I

THE COURT SHOULD NOT ENTERTAIN A HYPOTHETICAL "PUBLIC HEALTH" RATIONALE FOR THE HOMOSEXUAL CONDUCT LAW THAT TEXAS HAS NEVER ADVANCED AND THAT ITS LEGISLATURE IN FACT SPECIFICALLY CONSIDERED AND REJECTED

The State of Texas has consistently maintained that the sole "legitimate state interest" furthered by the Homosexual Conduct Law is "preserving public morals." *Lawrence v. State*, 41 S.W.3d 349, 354 (Tex. App. 2001); *see also* Respondent's Br. in Opp'n to the Pet. for a Writ of Cert. at 14-20. The State has never argued that the law advances *any* public health interest, much less the baseless one proffered by *amicus* PFLC that it is a "good and necessary law to preserve the right of [Texas] to regulate conduct which can result in disease and death," specifically AIDS. (PFLC Br. at 2). The State's failure to embrace this hypothetical justification is unsurprising, since any such rationale is completely belied by the law's actual legislative history.

First, as the court below recognized, "*[f]or most of its history*, Texas has deemed deviate sexual intercourse, *i.e.*, sodomy, to be unlawful whether performed by persons of the same or different sex." 41 S.W.3d at 353 & n.7 (citing statutes dating back to 1879) (emphasis added). The Homosexual Conduct Law dates to 1973, when the Texas legislature "repealed its prohibition of sodomy generally, except when performed by persons of the same sex." *Id.* at 353. The first reported AIDS case, however, occurred in 1981. *See* Centers for Disease Control and Prevention ("CDC"), *The HIV/AIDS Epidemic: The First 10 Years*, 40 Morbidity & Mortality Wkly. Rep. 357, 357 (1991) ("On June 5, 1981, the first cases of an illness subsequently defined as acquired immunodeficiency syndrome (AIDS) were reported by health-care providers in California and CDC.") Accordingly, the Texas legislature could not have enacted

the Homosexual Conduct Law to curtail the spread of AIDS. *See Baker v. Wade*, 106 F.R.D. 526, 534 (N.D. Tex.) ("It is obvious that the Texas Legislature did not consider the AIDS problem when it passed § 21.06 as part of the general revision of the Penal Code in 1974. Indeed, the AIDS epidemic did not even exist at that time."), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

Moreover, the same specious public health arguments raised by *amicus* PFLC were actually presented to and rejected by the Texas legislature. In 1983, several Texas representatives sought to amend the Homosexual Conduct Law, purportedly for the specific purpose of using it to address AIDS. Their proposal, H.B. 2138, "would have broadened § 21.06 to prohibit any homosexual conduct or 'sexual contact'" and "dramatically increased" the punishment for violations of the law from the $200 fine then proscribed to "2-10 years imprisonment and a $5,000 fine for the first offense ('third-degree felony'); 2-20 years imprisonment and a $10,000 fine for subsequent offenses ('second degree felony')." *Baker*, 106 F.R.D. at 530.

The Texas House Criminal Jurisprudence Committee conducted hearings on H.B. 2138, considering testimony from Dr. Paul Cameron remarkably similar to the arguments now advanced by PFLC.[2] Specifically, "Dr. Cameron testified, in substance, that AIDS is directly related to, and spread by, homosexual conduct – and that H.B. 2138 was needed to prevent homosexual conduct from destroying this country's public health." *Id.* at 531. After the Committee heard this AIDS "evidence," it declined to adopt the proposed changes, referring H.B. 2138 to subcommittee where the bill died at the close of the 1983 legislative session. *Id.*

[2] Dr. Cameron, who is cited as an authority in a publication referenced by PFLC (*see* PFLC Br. at 11 n.6 (citing Medical Institute for Sexual Health, *Executive Summary: Health Implications Associated with Homosexuality* (1999)), has been discredited in both the scientific community and the courts. *See Resolution of the Neb. Psychol. Ass'n* (Oct. 19, 1984) ("The science and profession of psychology in Nebraska as represented by the Nebraska Psychological Association, formally dissociates itself from the representations and interpretations of scientific literature offered by Dr. Paul Cameron in his writings and public statements on sexuality."), *available at* http://psychology.ucdavis.edu/rainbow/html/facts_cameron_sheet.html; *Baker*, 106 F.R.D. at 536 (referring to Dr. Cameron's testimony that homosexuals abuse children at greater rate than heterosexuals as "fraud or misrepresentations" on court); *see also id.* at 536 n.31 (noting Dr. Cameron's resignation from American Psychological Association to avoid investigation into charges of unethical conduct, including "misrepresentation of . . . research sources on homosexuality; inflammatory and inaccurate public statements about homosexuals; and his fabrications to a Nebraska newspaper about the supposed sexual mutilation of a four year old boy by a homosexual"). (footnote continued)

This history underscores that Texas's Homosexual Conduct Law was not intended "to regulate conduct which can result in disease and death." (PFLC Br. at 2). Accordingly, that purported justification cannot now sustain the law's constitutionality. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

This Court should not consider, much less accept, a purported justification that is not even advanced by the State and that, subsequent to the law's adoption, was expressly considered and rejected by the Texas legislature. Accordingly, even if it were not otherwise groundless (as demonstrated below), PFLC's *post hoc* public health argument cannot sustain the constitutionality of the Homosexual Conduct Law.

POINT II

THE HOMOSEXUAL CONDUCT LAW DOES NOT BEAR EVEN A RATIONAL RELATIONSHIP TO ANY PUBLIC HEALTH PURPOSE

Even assuming that the State of Texas were belatedly to embrace a public health rationale for the Homosexual Conduct Law, such a purported justification could not pass constitutional muster. Because the law targets only lesbians and gay men, there must be a medically rational fit between that class-based distinction and the purported public health objective. Here, however, the Homosexual Conduct Law is so grossly under and overinclusive as a means of preventing HIV transmission that it cannot be taken seriously as a public health measure. The law is not only an ineffective means of controlling the spread of HIV – it actually undermines legitimate education, outreach, and treatment programs that do serve this end, ironically frustrating the very public health goal that *amicus* PFLC invokes. These facts render any purported public health justification utterly irrational and incapable of sustaining the law's constitutionality.

A. A Medically Reasonable and Rational Relationship Must Exist Between a Law and its Purported Public Health Objective

This Court long ago held that intrusive legislation serving public health objectives is constitutionally permissible only if it bears a "real or substantial relation to the protection of the public health." *Jacobson v. Massachusetts*, 197 U.S. 11, 28, 31 (1905). Where a public health measure is applied "in reference to particular persons in [] an arbitrary, unreasonable manner," that situation may "compel the courts to interfere for the protection of such persons." *Id.* at 28.

Although *Jacobson* predated modern equal protection jurisprudence, its core principle remains relevant. *See* Scott Burris, *Rationality Review and the Politics of Public Health*, 34

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Vill. L. Rev. 933, 966 (1989) ("*Jacobson*'s approach has continued to be the model for health cases.") (citing cases). Even under the least demanding test applied to assess the constitutionality of legislative action, a rational relationship must exist between a law and its purported public health objective. *See Craigmiles v. Giles*, 312 F.3d 220, 226 (6th Cir. 2002) (invalidating provision of Tennessee Funeral Directors and Embalmers Act that forbid anyone from selling caskets without a license because "[e]ven if casket selection has an effect on public health and safety, restricting the retailing of caskets to licensed funeral directors bears no rational relationship to managing that effect").

Where a law targets a specific class of citizens in the name of public health, the Equal Protection Clause requires some fit between that classification and the law's purported objective. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).[3] In particular, where a law's "sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

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[3] In *Cleburne*, which involved a constitutional challenge to a zoning ordinance that required permits for group homes for the mentally retarded, the State of Texas argued to this Court that the ordinance should be stricken on "rational basis" review. *See* Brief of *Amici Curiae* State of Texas and Texas Department of Mental Health and Mental Retardation, *Cleburne* (No. 84-468). The State maintained that the city was required to "come forward with some difference in the adverse impact of group homes for the mentally retarded – as compared to the impact of nursing homes for the aged, turberculosis sanitariums, halfway houses for youthful offenders, etc. – on the health, safety, morals or general welfare of the community." *Id.* The State argued that because the city could not make that showing, the ordinance did not survive "rational basis" scrutiny. *Id.* The same test that Texas urged there applies here.

In assessing whether a rational relationship exists between a law and a professed public health objective, the medical grounding of the legislature's judgment is a critical consideration. For example, a "statute's superficial earmarks as a health measure" will not satisfy "rational basis" review if it is so overly broad as to proscribe conduct wholly unrelated to the purported public health purpose. *See Eisenstadt v. Baird*, 405 U.S. 438, 450-52 (1972) (statute prohibiting distribution of all contraceptives to unmarried persons had "no public health purpose," in part because "'certain contraceptive medication and devices constitute no hazard to health, in which event . . . the statute swept too broadly in its prohibition.'") (citation omitted).[4] Likewise, where a statute that purports to further public health has the actual effect of undermining that goal, the law cannot be sustained on "rational basis" scrutiny. *See Craigmiles*, 312 F.3d at 226 (claim that restricting casket sales to licensed funeral directors was rationally related to public health interest of casket quality control rejected in part because restriction actually appeared to have *adverse* effect on casket quality).

B. Because the Homosexual Conduct Law is at Once Grossly Over and Underinclusive as a Means of Preventing AIDS, It Cannot Plausibly Be Viewed as a Legitimate Public Health Measure

The Homosexual Conduct Law's lack of any legitimate public health rationale is immediately apparent based on the disconnect between its classification and the principal health

[4] Although *Eisenstadt* is frequently misunderstood as a "fundamental rights" case, it actually employed "rational basis" review. *See Eisenstadt*, 405 U.S. at 447 n.7 ("Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms . . . the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest. But . . . we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.") (citations omitted).

problem that *amicus* PFLC claims it addresses – the transmission of HIV, the virus that causes AIDS. The Homosexual Conduct Law prohibits all contact between any part of the genitals of one person and the mouth or anus of another person of the same sex. Tex. Penal Code Ann. §§ 21.01(1), 21.06 (Vernon 1994).[5] The law is "at once too narrow and too broad" as a means of preventing AIDS, belying any "rational relationship to [that] independent and legitimate legislative end." *Romer*, 517 U.S. at 633. Indeed, the purported public health goal is so divorced from the actual statutory language that it would be impossible to credit it as the legislature's legitimate purpose. *Id.* at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them . . . . It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests. . . .").[6]

[5] In addition, the law proscribes the penetration of the genitals or anus of another person of the same sex with an object. *Id.*

[6] The strategy of justifying laws reflecting invidious discrimination with the purported advancement of public health is not new. Indeed, miscegenation laws, which were declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967), were frequently defended as necessary public health measures. *See, e.g., Scott v. State*, 39 Ga. 321, 323 (1869) ("The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race."); *see also* Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. Davis L. Rev. 795, 802 (2000) (California miscegenation law, as applied to Chinese Americans, was "presented as a public health concern, for Chinese were assumed . . . to be full of filth and disease"); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. Contemp. Health L. & Pol'y 1, 6 (1996) (eugenicist defenders of miscegenation laws "insisted that the 'social problem classes' were a public health issue and a medical problem"); Phillip Reilly, *The Virginia Racial Integrity Act Revisited: The Plecker-Laughlin Correspondence: 1928-1930*, 16 Am. J. Med. Genetics 483 (1983) (chronicling role of "public health advocate" Dr. Walter Ashby Plecker in passage of Virginia Racial (footnote continued)

The Homosexual Conduct Law is strikingly over and underinclusive in several specific ways. First, the law is underinclusive in that it does not regulate heterosexual vaginal intercourse, an increasingly common means of HIV transmission in the United States. Worldwide, vaginal intercourse is the leading route of HIV transmission. *See* CDC, *Can I Get HIV from Having Vaginal Sex?*, *at* http://www.cdc.gov/hiv/pubs/faq/faq21.htm; Thomas C. Quinn, *Viral Load, Circumcision, and Heterosexual Transmission*, 12 The Hopkins HIV Report 1, 5 (2000), *available at* http://hopkins-aids.edu/publications/report/may00_1.html ("Heterosexual transmission remains the most common mode of transmission of HIV throughout the world. Over 85% of new infections are acquired heterosexually. . . ."). Although the aggregate numbers of U.S. AIDS cases is currently higher for men having sex with men than for heterosexuals, the CDC reports that from 1996 through 2001, "[b]y risk, AIDS incidence declined sharply and then leveled among men who have sex with men." CDC, 13 *HIV/AIDS Surveillance Report* 1, 5 (2001). In contrast, "[a]mong persons exposed through heterosexual contact, incidence declined slowly from 1996 through 1998 but seems to have increased through 2001. *Id.* Heterosexual activity poses a particularly grave risk of HIV transmission for women. In a 2000 survey, 38% of women reported with HIV/AIDS were found to have been infected through heterosexual exposure. *See* CDC, *HIV/AIDS Among US Women: Minority and Young Women at Continuing Risk*, at

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Integrity Act). The parallel between the history of miscegenation and sodomy laws has been noted by members of this Court. *See Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1986) (Blackmun, J., dissenting) (noting that parallel between miscegenation and sodomy laws "is almost uncanny"); *id.* at 216 n.9 (Stevens, J., dissenting) (observing that "miscegenation was once treated as a crime similar to sodomy").

http://www.cdc.gov/hiv/pubs/facts/women.htm.[7] In Texas, there is an "increasing spread of new infections among females." Texas Dep't of Health Bureau of HIV & STD Prevention, *HIV/STD Annual Report* 8 (2001). Worldwide, women now account for half of all reported cases of adult HIV infection. *See* CDC, *Basic Statistics*, *at* http://www.cdc.gov/hiv/stats.htm.

Second, the law's proscriptions with regard to anal sex are similarly underinclusive. The risk of HIV transmission during unprotected anal sex with an infected partner is the same for heterosexuals and homosexuals. Yet the statute bans this activity only for same-sex couples. Given that many studies demonstrate that heterosexuals regularly engage in this sexual activity, there is no public health explanation for the distinction. *See* Pamela Bean, *Containing the Spread of HIV Infection Among High-Risk Groups*, 21 Am. Clinical Laboratory 19, 19 (June 2002) ("the sheer number of heterosexual couples engaging in [anal intercourse] far outnumber the total population of men who have sex with men"); Janice I. Baldwin & John D. Baldwin, *Heterosexual Anal Intercourse: An Understudied, High-Risk Sexual Behavior*, 29 Archives of Sexual Behavior 357, 362 (Aug. 2000) (nearly 23% of surveyed sexually active heterosexual college students engaged in anal intercourse; condoms were used only 20.9% of time); Gary J. Gates & Freya L. Sonenstein, *Heterosexual Genital Sexual Activity Among Adolescent Males: 1988 and 1995*, 32 Family Plan. Persp. 295, 296 (Nov./Dec. 2000) (11% of surveyed heterosexual adolescent males had engaged in anal sex with females).

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[7] Injection drug use ("IDU") was the infection route for another 25% of women, and receipt of blood transfusions, blood components, or tissue accounted for 1%. *Id.* Although the risk exposure for the remaining 36% of AIDS cases among women was deemed "not reported or identified," the CDC noted that "most will be reclassified as heterosexual or IDU after follow-up investigations are complete." *Id.*

Third, the law is overinclusive in that it bans sexual practices that are not likely to transmit HIV. For example, the risk of HIV transmission through cunnilingus – which is banned between same-sex, but not opposite-sex partners – is virtually nil compared to anal and vaginal intercourse. CDC, *HIV/AIDS Update, Preventing the Sexual Transmission of HIV, the Virus That Causes AIDS: What You Should Know About Oral Sex, at* ftp://ftp.cdcnpin.org/Updates/oralsex.pdf. Similarly, a recent study showed that the risk of a man acquiring HIV through unprotected oral sex with another man is extremely low, with a near-zero chance of infection. Kimberly Page-Shafer et al., *Risk of HIV Infection Attributable to Oral Sex Among Men Who Have Sex With Men and in the Population of Men Who Have Sex With Men*, 16 AIDS 2350, 2350-51 (2002). Another recent study likewise showed that frequent unprotected oral sex carries a low risk of infection. CDC, *Primary HIV Infection Associated With Oral Transmission, at* http://www.cdc.gov/hiv/pubs/facts/oralsexqa.htm (7.8% (8 of 102) of HIV infections attributed exclusively to oral sex; in half of these cases, oral problems such as bleeding gums existed).[8]

Fourth, the Homosexual Conduct Law applies equally to sexual activity between two men and between two women even though studies consistently show that the risk of HIV transmission between female partners is negligible. *See* CDC, *HIV/AIDS & U.S. Women Who Have Sex with Women (WSW), at* http://www.cdc.gov/hiv/pubs/facts/wsw.htm;

[8] In addition to the law's overbreadth in banning oral sex, it is at the same time underinclusive in this regard. The law precludes only lesbians and gay men from engaging in this behavior, even though heterosexuals regularly engage in the practice. *See* John H. Gagnon, *A Comparative Study of the Couple in the Social Organization of Sexuality in France and the United States*, 38 J. Sex Res. 10 (Feb. 2001), *available at* http://www.findarticles.com/cf_dls/m2372/1_38/75820035/p1/article.jhtml (35% of heterosexual males and 26% of heterosexual females in United States engaged in oral sex during their last sexual event); Gates & Sonenstein, *supra*, at 296 (49% of surveyed heterosexual adolescent males had received oral sex from females, 39% had performed oral sex on females).

Rimi Shah & Caroline Bradbeer, *Women and HIV - Revisited Ten Years On*, 11 Int. J. STD & AIDS 277, 278 (May 2000); Vickie M. Mays et al., *The Risk of HIV Infection for Lesbians and Other Women Who Have Sex with Women: Implications for HIV Research, Prevention, Policy, and Services*, 2 Women's Health: Res. on Gender, Behav. & Pol'y 119, 125 (1996). Drawing lines simply because sex partners are of the same sex, irrespective of their gender, is not rationally related to controlling the spread of HIV.[9]

Fifth, the law does not distinguish between safe and unsafe sexual practices. For example, the law fails to differentiate unprotected sexual activity from that performed with a condom. In studies of uninfected people who were involved in sexual relationships with HIV-positive partners, 98-100% of those people who used latex condoms correctly and consistently did not become infected,

[9] PFLC's own source, a monograph published by the "Medical Institute for Sexual Health," states that female-to-female transmission of HIV is "relatively rare" and that "[w]omen who have sex only with women are at significantly decreased risk of sexually transmitted disease." Medical Institute for Sexual Health, *Health Implications Associated With Homosexuality* 59, 62 (1999). These are no small concessions from an organization whose literature otherwise "characterize[s] homosexual relationships as both unhealthy and wrong and suggests that for those who have a 'homosexual orientation,' refraining from sex forever may be preferable for 'health, moral or religious reasons.'" Human Rights Watch, 14 *Ignorance Only, HIV/AIDS, Human Rights, and Federally Funded Abstinence-Only Programs in the United States, Texas: A Case Study* 1, 38 (Sept. 2002), *available at* http://www.hrw.org/reports/2002/usa0902/ USA0902.pdf. PFLC completely ignores the Medical Institute's observations concerning the overall remote risk of STD transmission in lesbian sexual activities, seizing instead upon the Medical Institute's discussion of one particular STD, bacterial vaginosis, which is found at a higher rate among lesbians than heterosexual women. (PFLC Br. at 11). PFLC also curiously cites a purported elevated risk of breast and ovarian cancer among women who have sex with women (*id.*), without even attempting to explain what relevance such statistics could possibly have to a ban on sexual activity or to establish any cause and effect relationship between sexual orientation and such health concerns.

even with repeated sexual contact. CDC, *How Effective Are Latex Condoms in Preventing HIV?, at* http://www.cdc.gov/hiv/pubs/faq/faq23.htm. *See also* Quinn, *supra,* at 5 ("consistent condom use is the most important measure for preventing HIV transmission"). Nor does the Homosexual Conduct Law's proscription against the use of "objects" in sexual activity between same-sex partners bear any rational relationship to reducing the spread of AIDS. Penetration with an object cannot itself transmit the HIV virus and therefore can be an extremely safe form of sexual activity from the perspective of AIDS prevention. In any event, whatever "public health" risks could conceivably be associated with this practice have nothing to do with whether the sexual partners are of the same or different genders.

Sixth, the Homosexual Conduct Law does not account in any manner for the HIV status of sex partners. Obviously, there is no risk of transmission where both partners are free of the virus. Particularly in the case of a monogamous relationship between healthy partners, criminalization of sexual activity is utterly irrational as a public health measure.

The complete lack of fit between the classifications drawn by the Homosexual Conduct Law and the actual science of HIV transmission belies the public health rationale offered by *amicus* PFLC. Several state courts have accordingly rejected such a purported "public health" justification for same-sex sodomy laws. *See Gryczan v. State,* 942 P.2d 112, 124 (Mont. 1997) ("[T]he inclusion of behavior not associated with the spread of AIDS and HIV and the exclusion of high-risk behavior among those other than homosexuals indicate the absence of any clear relationship between the statute and any public health goals."); *Commonwealth v. Wasson,* 842 S.W.2d 487, 501 (Ky. 1992) ("The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS.").

PFLC tries to obscure the lack of a medically rational relationship between the Homosexual Conduct Law and the ways in which HIV is transmitted by stressing the higher incidence of AIDS in the homosexual male population and the statistical impact on life expectancy that has followed from that higher incidence. (PFLC Br. at 9-10). Increased mortality, however, is an effect of AIDS and not of homosexuality itself. The authors of the study cited by PFLC as establishing the "dramatic impact on the age of mortality for those involved in same-sex relationships" (PFLC Br. at 10) have explained that the study measured the impact of *HIV infection* on gay and bisexual men and did not establish that homosexual couples *per se* have a dramatically increased mortality rate. Robert S. Hogg et al., *Letter to the Editor: Gay Life Expectancy Revisited,* 30 Int'l J. Epidemiol. 1499 (2001).[10]

Under the Homosexual Conduct Law, a gay man or lesbian who is disease-free and engages in protected monogamous sexual relations is branded a criminal, while an infected heterosexual who engages in unprotected intercourse with multiple partners does not violate that law. This result is clearly irrational if the true purpose of the law is to stop the spread of AIDS. Simply calling the Homosexual Conduct Law a "public health measure" does not make it one in the absence of a rational basis for the law's distinction between same-sex and opposite-sex activity. PFLC's presentation to this Court appears to be

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[10] The authors also have expressed frustration that their work has been distorted by extremist anti-gay groups to justify discrimination. *Id.* ("These homophobic groups appear more interested in restricting the human rights of gays and bisexuals rather than promoting their health and well being . . . . We do not condone the use of our research in a manner that restricts the political or human rights of gay and bisexual men or any other group."). Moreover, the authors have noted that a revisited study would show a "greatly improved" life expectancy for gay and bisexual men because "[d]eaths from HIV infection have declined dramatically in this population since 1996." *Id.*

grounded not in science, but in animus towards gay people – an illegitimate basis for government discrimination even under rational relationship review. *See Romer*, 517 U.S. at 633-35.[11]

C. The Homosexual Conduct Law In Fact Undermines Public Health Interests, Defeating Any Possibility that the Law Could Be Defended as Rationally Related to Such a Justification

The egregious under and overbreadth of the Homosexual Conduct Law itself renders untenable the notion that it advances the public health. But any vestige of a public health rationale is eliminated by clear evidence that the law (i) actually *undermines* legitimate AIDS prevention programs and (ii) itself inflicts harm upon lesbians and gay men.

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[11] PFLC's animus toward gay people is neither subtle nor disguised. PFLC bills itself as "the nation's only law-oriented entity devoted exclusively to opposing the homosexual agenda," with a mission "to develop and promote strategies to defeat the 'gay' movement." See PFLC Home Page, *at* http://abidingtruth.com. PFLC's president, Scott Douglas Lively, Esq. is, by his own admission, "a full-time activist" against the advancement of civil rights for gay people, writing that "the organized homosexual political movement may be the most destructive social force in America today." Scott Lively, *Why and How to Defeat the "Gay" Movement* 1, 1 (2001). Indeed, PFLC believes that "the most important function of sodomy laws is to deter the spread of homosexuality in society," and that sodomy itself is an "act of sadism and violence" akin to wife beating. *In Defense of Sodomy Laws*, *at* http://www.abidingtruth.com/In%20Defense%20of%20Sodomy%20laws.html. PFLC's extreme positions regarding homosexuality are exemplified by Mr. Lively's book *The Pink Swastika: Homosexuality in the Nazi Party* (1995), which purportedly "documents the homosexual roots of Nazism and the central role of homosexuals in the Holocaust." *See* Biographical Profile of Scott Lively, *at* http://www.abidingtruth.com/about/. In a subsequent publication, Mr. Lively purports to have detected "a dark and powerful homosexual presence in other historical periods: the Spanish Inquisition, the French 'Reign of Terror,' the era of South African apartheid, and the two centuries of American slavery." Scott Lively, *The Poisoned Stream: "Gay" Influence in Human History, Volume One, Germany 1890 - 1945*, Author's Forward, *available at* http://www.abidingtruth.com/poisoned stream/forward.html.

1. *The Law Does Not Deter the Spread of AIDS and Impedes the Effectiveness of AIDS Prevention Efforts*

There is no evidence that criminalizing homosexual activity deters unsafe sexual practices. In fact, the trend to *de*-criminalize sodomy has coincided with a *decrease* in HIV transmission rates among gay men.[12] This is not surprising because sodomy laws have the perverse effect of impeding efforts to curb the transmission of HIV. "[T]he generalized use of the criminal law is unlikely to become an effective tool for public health," Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* 234 (2000), and criminalization in this context is particularly likely to interfere with public health protection for a number of reasons.

First, sodomy laws hamper efforts intended to advise the public how to minimize the danger of contracting AIDS. Researchers report dramatic changes in sexual behavior reducing the risk of AIDS in areas where major educational efforts, such as teaching "safer sex" guidelines, have been employed. *See, e.g.*, Jeffrey D. Fisher et al., *Changing AIDS Risk Behavior: Effects of an Intervention Emphasizing AIDS Risk Reduction Information, Motivation, and Behavioral Skills in a College Student Population*, 15 Health Psychol. 114 (1996); M. Morris & L. Dean, *Effect of Sexual Behavior Change on Long-Term Human Immunodeficiency Virus Prevalence Among Homosexual Men*, 140 Am. J. Epidemiol. 217 (1994). The Homosexual Conduct Law interferes with AIDS public education efforts by putting health educators in the untenable position of appearing to facilitate unlawful behavior. Under the Texas law, educators who encourage

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[12] Between 1996 and 2001 – as the rate of HIV transmission in the category of men having sex with men "declined sharply and then leveled," CDC, 13 *HIV/AIDS Surveillance Report* 1, 5 (2001) – nine states repudiated their sodomy laws by legislative or judicial action: Tennessee (1996), Montana (1997), Georgia (1998), Rhode Island (1998), Maryland (1999), New York (2000), Arizona (2001), and Minnesota (2001).

"safer sex" practices as proven alternatives to risky behavior may be seen as advocating criminal conduct.[13]

Moreover, the Homosexual Conduct Law discourages Texas's gay citizens from seeking accurate public health information concerning HIV transmission. Openly gay people who attend educational presentations on AIDS risk reduction may fear that they are admitting to engaging in criminal activity. The fear of prosecution also may deter lesbians and gay men from speaking candidly about their sexual behaviors and asking necessary questions. As the Joint United Nations Programme on HIV/AIDS (UNAIDS) has written, in advocating repeal of criminal sodomy laws:

> Criminalizing behaviour forces individuals to lead "double lives" to hide it (particularly in isolated or rural communities where the threat of identification is very real), making access to educational programmes more difficult. Such laws place health workers and educators at the risk of aiding and abetting offences, because they can be accused of promoting or encouraging these sexual acts when in fact, they are merely advising how to carry them out safely. Such a situation tends to create suspicion and hostility between health workers, communities and authorities, rather than an atmosphere of trust and cooperation.

UNAIDS, *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of Its Devastating Human, Economic and Social Impact* 55 (1999). *See also Gryczan v. State*, 942 P.2d 112, 124 (Mont. 1997)

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[13] The Homosexual Conduct Law also has been used to justify cuts in funding to AIDS educational programs for gay men in Texas — an even more direct impact obviously inconsistent with any "public health" rationale for the law. *See* John Gallagher, *Refusal to Rule*, The Advocate, Feb. 22, 1994, at 24.

("[E]ducation and counseling are the most effective means of changing behavior and [] criminal statutes seriously undermine public health strategies by causing individuals to conceal or distort relevant information and by inhibiting effective public education efforts.").

In addition to the adverse impact of sodomy laws on public education efforts, such laws may deter gay people from being candid with their physicians concerning behavior that may expose them to HIV and in some cases may discourage them from getting tested or seeking treatment. *See* Scott Dunbar & Susan Rehm, *On Visibility: AIDS, Deception By Patients, and the Responsibility of the Doctor*, 18 J. Med. Ethics 180, 184-85 (1992) (in case studies of HIV-positive gay men, "[f]ear of condemnation by the doctor . . . restricted communication towards the goal of the maintenance of the patient's health, their mutual concern. The lack of trust which inhibits truth-telling results in mutual and progressive isolation which impedes the provision of optimal care."); J. Kelly Strader, *Constitutional Challenges to the Criminalization of Same-Sex Sexual Activities: State Interest in HIV-AIDS Issues*, 70 Denv. U. L. Rev. 337, 356 (1992) ("[P]revention and treatment of HIV-AIDS depends upon continuing research and treatment. Same-sex sodomy laws deter gay men, as a high risk group, from providing information to health officials and researchers. The laws discourage homosexuals from seeking prompt and adequate testing, counseling and medical care."); *see also Campbell v. Sundquist*, 926 S.W.2d 250, 263-64 (Tenn. Ct. App. 1996) (noting that fear of prosecution causes some gay individuals to avoid medical treatment and others to avoid being tested for infection); *State v. Saunders*, 381 A.2d 334, 342 (N.J. 1977) (observing "counter-productive" nature of fornication statute as means of combating venereal disease because "[t]he fear of being prosecuted for the 'crime' of fornication can only deter people from seeking [] necessary treatment").

For all these reasons, the Homosexual Conduct Law undermines the real public health measures — education,

testing, and treatment – that have proven effective in reducing the spread of AIDS.

2. *The Law Adversely Impacts the Mental and Physical Health of Lesbians and Gay Men*

In addition to impeding AIDS prevention efforts, the Homosexual Conduct Law harms the mental and physical health of gay people. By criminalizing core aspects of their intimate lives, the law serves to stigmatize gay people as "deviants." This stigmatization leads, in some gay people, to internalized self-hatred and consequential depression and other mental health problems. *See, e.g.*, Melanie D. Otis & William F. Skinner, *The Prevalence of Victimization and its Effect on Mental Well-Being Among Lesbian and Gay People*, 30 J. Homosex. 93, 110 (1996) (victimization adversely impacts mental health, as measured by depression, in lesbians and gay men); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38, 51 (1995) ("[R]esults indicated that *internalized homophobia* [defined as direction of societal negative attitudes toward the self], expectations of rejection and discrimination (*stigma*), and actual events of discrimination and violence (*prejudice*) . . . predict psychological distress in gay men.").[14]

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[14] Indeed, the internalized self-hatred that sodomy laws create or facilitate may have the perverse effect of increasing the likelihood that some gay people will engage in high risk sexual behavior. *See, e.g.*, David M. Huebner et al., *The Impact of Internalized Homophobia on HIV Preventive Interventions*, 30 Am. J. Community Psychol. 327 (June 2002) (internalized self-hatred by some homosexuals poses barriers to HIV prevention efforts); Margaret Rosario et al., *The Coming-Out Process and Its Adaptational and Health-Related Associations Among Gay, Lesbian, and Bisexual Youths: Stipulation and Exploration of a Model*, 29 Am. J. Community Psychol. 133, 156 (2001) (low self-esteem and emotional distress in gay youth population related to higher rate of unprotected sex). In contrast, fostering self esteem facilitates AIDS prevention efforts. *See* John C. Gonsiorek & Michael Shernoff, *AIDS Prevention and Public Policy: The Experience of Gay Males*, in *Homosexuality: Research Implications for Public Policy* 240 (John C. Gonsiorek & James D. Weinrich eds. 1991) ("[A] positive self-image with regard to homosexuality is a foundation (footnote continued)

Sodomy laws also reinforce negative views about gay people, perpetuating prejudice in some segments of society at large. Historically, expressions of bias against gay people have been particularly intense. Gay people "have been the object of some of the deepest prejudice and hatred in American society." Gary B. Melton, *Public Policy and Private Prejudice*, 44 Am. Psychologist 933, 934 (1989). *See also* Meyer, *supra*, at 38-42. Although the great majority of gay people successfully cope with the stresses created by societal stigma and develop a positive identity based upon their sexual orientation,[15] some do not and, consequently, become more troubled and dysfunctional.[16]

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upon which gay men successfully participate in and implement HIV infection prevention strategies.")

[15] *See* Shari Brotman et al., *The Impact of Coming Out on Health and Health Care Access: The Experiences of Gay, Lesbian, Bisexual and Two-Spirit People*, 15 J. Health Soc. Pol'y 1 (2002) (coming out leads to positive mental health for gay people); Yoel Elizur, *Family Support and Acceptance, Gay Male Identity Formation, and Psychological Adjustment: A Path Model*, 40 Family Process 125, 127 (Summer 2001) (even after "a particularly stressful adolescence," many gay and lesbian adults "make a rebound toward greater mental health and [] achieve a level of psychological adjustment on par with heterosexual comparison groups").

[16] The harmful effects of prejudice generally include "considerable distress, including feelings of personal loss, rejection, humiliation, and depression; agitation, restlessness, and sleep disturbances; somatic symptoms such as headaches and diarrhea; and deterioration in personal relationships." Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & Sexuality 133, 147 (1991); *see also* Linda D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpersonal Violence 366 (1990). Being the target of discrimination also leads to a sense that life is unfair and unjust, a persistent sense of vulnerability, and the feeling of being punished for being gay. Gregory M. Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, in *Homosexuality: Research Implications for Public Policy* 60 (John C. Gonsiorek & James D. Weinrich eds. 1991) (hereinafter "Herek, *Stigma*"); *see also* Daniel E. Bontempo & Anthony R. D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior*, 30 J. Adolesc. Health 364, 371-73 (2002) (homosexual youth experiencing high (footnote continued)

It is unsurprising, therefore, that a recent study cited by PFLC showed a higher incidence of mental health problems among homosexuals than among heterosexuals. (PFLC Br. at 11-12 (citing Theo G.M. Sandfort et al., *Same-Sex Sexual Behavior and Psychiatric Disorders*, 58 Archives of Gen. Psych. 85 (2001)).[17] These findings are consistent with data from mental health studies on other minority populations that have encountered systemic societal prejudice and hardly establish that gay people are inherently prone to mental health problems.[18] PFLC's reliance on this study to defend the Homosexual Conduct Law ironically uses the effects of oppression to rationalize and justify further oppression. Rather than ameliorating a public health concern, the Homosexual Conduct Law further stigmatizes gay people, perpetuating the prejudice that creates the very mental health problems discussed above.

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levels of at-school victimization also reported increased levels of substance abuse, suicidal tendencies, and risky sexual behavior); Otis & Skinner, *supra*, at 93-121 (victimization exacerbates depression in both lesbians and gay men).

[17] In fact, the authors acknowledge in this study that "[t]he effects of social factors on the mental health status of homosexual men and women have been well documented in studies, which found a relationship between experiences of stigma, prejudice, and discrimination and mental health status." Sandfort, *supra*, at 89.

[18] Numerous studies have found a correlation between reports of discrimination and psychological distress in minority populations. *See* Anderson J. Franklin & Nancy Boyd-Franklin, *Invisibility Syndrome: A Clinical Model of the Effects of Racism on African-American Males*, 70 Am. J. Orthopsychiatry 33 (2000); Samuel Noh, *Discrimination and Emotional Well-Being: Perceived Racial Discrimination, Depression and Coping: A Study of Southeast Asian Refugees in Canada*, 40 J. Health & Soc. Behav. 193 (1999); James S. Jackson et al., *Racism and the Physical and Mental Health Status of African Americans: A Thirteen Year National Panel Study*, 6 Ethnicity & Disease 132 (1996); Hortensia Amaro et al., *Family and Work Predictors of Psychological Well-Being Among Hispanic Women Professionals*, 11 Psychol. Women Q. 505 (1987).

The Homosexual Conduct Law may also endanger the physical well-being of gay people, by appearing to validate hostility, discrimination, and even violence against them. Lesbians and gay men in the United States are the victims of extensive discrimination and violence. In a series of surveys, an average of 44% of gay people reported that they had been subjected to threats of violence, and 80% reported verbal abuse, simply because they were perceived as gay. Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview* in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19, 20 (Gregory M. Herek & Kevin T. Berrill eds. 1992); *see also* Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual Adults*, J. Consulting & Clinical Psychol. 1 (1999) (study of 2259 lesbians, gay men, and bisexuals found approximately one-fifth of females and one-quarter of males had experienced bias-related criminal victimization).[19] The phenomenon of "gay bashing," in which people known or perceived to be gay are subjected to brutal, sometimes fatal, beatings, has been well documented nationally. *See, e.g.*, Brian Magruder et al., *The Relationship Between AIDS-Related Information Sources and Homophobic Attitudes: A Comparison of Two Models*, 25 J. Homosex. 47, 48 (1993). The problem has been particularly acute in Texas. *See* Susan Parrott, *Panelist Says Hate Crimes Legislation Is A Start, But Not a Cure-All*, Associate Press News Wires, Sept. 7, 2001 (noting that 20% of hate crimes in Texas were

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[19] Crime statistics confirm this picture. *See* Federal Bureau of Investigations, *Hate Crime Statistics 2001*, *at* http://www.fbi.gov/ucr/01hate.pdf. (1,664 reported hate crimes nationwide in 2001 were suffered by gay, lesbian, or bisexual victims, with 55 cases reported in Texas); Nat'l Coalition of Anti-Violence Programs, *Report: Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998*, at 10-15 (Apr. 6, 1999) (anti-gay violence resulting in murder skyrocketed by 136%, serious assaults were up 12%, inpatient hospitalizations rose by 108%). Many gay and lesbian crime victims are further victimized when they report the crime to the police. *Id.* at 21-24 (20% of people reporting anti-gay incidents were verbally and/or physically abused by police).

committed against gays and lesbians and that since 1988 eighteen gay men in Texas had been killed in hate-motivated attacks); *Killing of a Gay Resident Stirs Activism in an East Texas Town*, New York Times, Dec. 27, 1993 at A12 (reporting that 1989 survey found Texas second only to North Carolina in reported attacks on homosexuals).[20]

Sodomy laws reinforce individual hostility against gay people and thus may be perceived as implicitly endorsing continued personal violence against them. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 104 (2000) ("By labeling gay men and lesbians as criminals, sodomy laws make gay individuals targets for physical violence in the form of gay bashing, sometimes perpetrated as *de facto* enforcement of sodomy laws."); Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1490 (1992) ("[T]he criminalization of homosexual sodomy and crimes of homophobic violence mutually reinforce one another.").

Finally, sodomy laws act as a barrier to the eradication of prejudice. In the absence of first-hand knowledge, negative beliefs and fear of the different or unknown may grow into hatred for members of the alien group. Gordon Allport, *The Nature of Prejudice* 264-68 (1954). Conversely, familiarity tends to dispel prejudice. For example, a person who has gay-colleagues, friends, or relatives is substantially less likely to hate gay people and to harbor false stereotypes about the character and behavior of gay people generally. *See* Herek, *Stigma*, at 76-77 (citation omitted). But for such interaction to occur, the gay man or lesbian must disclose

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[20] Sodomy statutes may discourage victims of gay bashings from reporting such hate crimes to the police due to the risk of "secondary victimization" from law enforcement officials and others who learn about their sexual orientation. *See* Gregory M. Herek & Kevin T. Berrill, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, 5 J. Interpersonal Violence 401, 401-13 (1990).

his or her sexual orientation. The greatest impediment to that disclosure is the fear of stigmatization that might follow. *See* Caitlin Ryan & Donna Futterman, *Lesbian and Gay Adolescents: Identity Development*, 19 School Nurse News 18, 18 (May 2002) ("Because the repercussions of disclosing one's homosexuality can be extremely negative, including loss of job, loss of family and friends, victimization, and violence, many lesbians and gay males share their sexual identities only with other gay people. This limits awareness of the diversity of human sexuality. . . ."). By using the threat of the criminal law to reinforce such stigmatization, sodomy laws discourage gay people from revealing their sexual orientation, thereby making the eradication of prejudice more difficult.

In all these ways, the Homosexual Conduct Law strikes a devastating blow to the mental and physical well being of gay people – harming, rather than serving, the public health.

CONCLUSION

The judgment of the Texas Court of Appeals should be reversed.

Dated: January 16, 2003

Respectfully submitted,

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Petitioners,

vs.

STATE OF TEXAS,
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ON WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court,[1] NOW Legal Defense and Education Fund ("NOW Legal Defense" or "*Amicus*") submits this brief as *amicus curiae* in support of Petitioners John Geddes Lawrence and Tyron Garner.

NOW Legal Defense is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. NOW Legal Defense is dedicated to the rights of all women and men to live and work free of government-enforced gender stereotypes. NOW Legal Defense has consistently supported the right of lesbians and gay men to be free from discrimination.

Amicus has an interest in this case because it raises the critical issue whether the states may impose criminal liability on the basis of the gender of those who engage in intimate sexual conduct. Because the selective criminal prohibition of Texas Penal Code Section 21.06 ("Section 21.06") perpetuates gender stereotypes by dictating the roles that men and women must assume in intimate relationships, the statute is a harmful affront to gender equality.

SUMMARY OF THE ARGUMENT

Texas is one of only four states that criminalize private, noncommercial acts of sexual intimacy by consenting adults of the same sex, but not by different-sex couples. By mandating that women's intimate relationships shall only be with men and that men's intimate relationships shall only be with women, criminal laws such as Section 21.06 not only classify on the basis of gender on a formal level, but also

---

[1] Copies of the parties' letters of consent are filed herewith. Pursuant to Rule 37.6, counsel for *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, or its counsel, has made a monetary contribution to this brief's preparation or submission.

operate to enforce rigid and intrusive norms of gender-appropriate behavior. These norms are grounded in and reinforce underlying stereotypes of men's and women's "proper" roles and are similar to other gender-based stereotypes – built around notions of men's "natural" superiority and women's "natural" inferiority – that this Court has found it impermissible for the law to perpetuate. This Court's gender-discrimination cases make plain that states may not use the power of the law to require adherence to such gender stereotypes. *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"). Moreover, criminal prohibitions of consensual, same-sex intimacy warrant particularly careful equal protection scrutiny because they use the threat of arrest, conviction, and punishment to enforce the state's view of what constitutes gender-appropriate conduct.

On its face, Section 21.06 makes criminality turn on the gender of the actors involved in intimate sexual conduct, not on the conduct itself, which the Texas Penal Code separately defines in gender-neutral terms. *See* Tex. Penal Code Ann. § 21.06 (Vernon 1994) (criminalizing certain sexual conduct when engaged in "with another individual of the same sex"). In this case, the only reason Texas subjected Petitioners to arrest, imprisonment, and fines for the conduct in which they engaged in the privacy of one Petitioner's home is that they both are men.

The Texas Court of Appeals ignored the facial gender classification of Section 21.06 on the ground that the statute applies equally to men and women who are sexually intimate with persons of the same gender. *Lawrence v. State*, 41 S.W.3d 349, 359 (Tex. App. 2001). This Court, however, has repeatedly rejected just such "equal discrimination" arguments in the context of laws that discriminate based on race, *see, e.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964), and has similarly discredited such reasoning in cases dealing with gender classifications, *see Califano v. Westcott*, 443 U.S. 76, 84 (1979). Just as it is no longer subject to

serious debate that laws prohibiting intimacy between members of different races impermissibly discriminate on the basis of race, so it is time for this Court to recognize that laws that criminalize intimacy between members of the same sex impermissibly discriminate on the basis of gender.

The only purported justification that Respondent has offered in support of Section 21.06 is the vague concept of "morality." Respondent, however, has not offered any explanation of what it means by "morality" other than a desire to enforce stereotyped norms of gender-appropriate sexual behavior. As this Court's precedents make clear, the enforcement of gender-role norms is an improper basis for government legislation and thus cannot support the constitutionality of Section 21.06 even under rational basis review. *A fortiori*, Section 21.06 plainly fails to satisfy the heightened scrutiny that applies to laws that discriminate based on gender. A state may not use the power of the law – let alone the particularly coercive power of the criminal law – to enforce its stereotypic preferences regarding gender-appropriate conduct.

For these reasons, and as set forth in more detail below and in the Brief for Petitioners,[2] the Court should reverse the judgment of the Texas Court of Appeals.

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[2] This brief addresses the ways in which Section 21.06 violates the Equal Protection Clause by impermissibly classifying on the basis of gender. *Amicus* also fully endorses Petitioners' arguments that Section 21.06 impermissibly discriminates on the basis of sexual orientation and violates rights of privacy protected by the Due Process Clause of the Fourteenth Amendment by denying adult couples the fundamental right to engage in consensual, non-commercial, intimate sexual conduct in the home.

ARGUMENT

I. Laws That Criminalize Same-Sex Intimate Conduct, Such As Texas Penal Code Section 21.06, Impermissibly Require Adherence To Gender Stereotypes.

By prohibiting certain intimate sexual conduct between persons of the same sex, while permitting the same conduct by different-sex couples, Section 21.06 mandates that consensual adult sexual relationships conform to sex-role stereotypes. These stereotypes, although familiar and deeply rooted, in fact arise from the same sources and operate in a similar manner as other gender stereotypes that this Court has found it impermissible for the law to perpetuate. As explained in detail in Part II below, Section 21.06 imposes this mandate through a gender-based classification that is readily apparent on the face of the statute. The gender classification in Section 21.06 is neither based on physiological differences between the sexes nor designed to compensate for past discrimination or to ensure equal opportunity. *See VMI*, 518 U.S. at 533-34. Rather, Section 21.06 directly enforces the State's view of gender-appropriate behavior: that women may express sexual intimacy only with men, and that men may express sexual intimacy only with women. Moreover, as explained below, these stereotypes are built on a paradigm of inequality that associates men with superiority and dominance and devalues women. In recent cases, this Court has consistently found the enforcement of such sex roles – both for men and for women – to be an improper basis for legislation.

A. For Much Of This Nation's History, Gender Classifications In The Law Served As A Means Of Requiring Adherence To Gender Stereotypes That Were Understood As "Natural," "Moral," And "Traditional."

Throughout "volumes of history," *VMI*, 518 U.S. at 531, the states and the federal government – with the blessing of this Court – used the law to maintain rigid definitions of gender-appropriate conduct and thereby to limit individual opportunity. For example, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), this Court agreed with the Illinois courts that the Illinois Bar could, consistent with the Fourteenth Amendment as then understood, exclude women from the practice of law. *Bradwell*, 83 U.S. at 137-39. The Illinois court had upheld Myra Bradwell's exclusion from the practice of law on the ground that, as a married woman, she could not enter into a binding contract without her husband and thus would be unable to establish contractual relationships with her clients. *Id.* at 131. In a now-infamous concurrence, Justice Bradley emphasized the "natural and proper" differences between men and women, long-embodied in the law, as a basis for denying women the right to practice law:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . It is true that many women are unmarried . . . but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution

> of things, and cannot be based upon exceptional cases.

Id. at 141-42 (Bradley, J., concurring).

In invoking "the law of the Creator," Justice Bradley was essentially asserting, like Respondent State of Texas in this case, that the states could invoke a particular view of "morality" to justify legislation enforcing gender stereotypes. Yet "morality" or "nature" is an unsatisfactory justification for state efforts to regulate adherence to traditional sex-role norms, as demonstrated by numerous now-discredited decisions that relied on those grounds. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding law prohibiting most women from bartending on "moral and social" grounds); *Fitzpatrick v. Liquor Control Comm'n*, 316 Mich. 83, 104, 25 N.W.2d 118, 127 (1946) (upholding law prohibiting women from bartending as potentially "conducive of good morals – either those of women themselves or the morals of the customers in such places"), *overruled by Bundo v. City of Walled Lake*, 395 Mich. 679, 238 N.W.2d 154 (1976); *People v. Charles Schweinler Press*, 214 N.Y. 395, 402-04, 108 N.E. 639, 640-41 (1915) (upholding law restricting women's night work, justified as measure "to protect and preserve the health and to some extent the morals of women"); *Adams v. Cronin*, 29 Colo. 488, 496, 69 P. 590, 593 (1902) (upholding prohibition of women's entry to "wine rooms" on basis that "[i]f a discrimination is made against women . . . because of the immorality that would be likely to result if the regulation was not made, the regulation would be sustained"); *In re Goodell*, 39 Wis. 232, 245-46 (1875) ("The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of

law, are departures from the order of nature; and when voluntary, treason against it.").

More recently, in *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court upheld a Florida statute requiring men to register for jury duty while making registration optional for women. *Id.* at 62-63. In so holding, only four decades ago, the Court stated that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, *woman is still regarded as the center of home and family life*." *Id.* (emphasis added). Thus, the Court concluded: "We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own *special responsibilities*." *Id.* at 62 (emphasis added).

Gender-based restrictions imposed by laws such as those at issue in these cases stemmed from, and in turn reinforced traditional notions that "morality" and the "natural order" required women to accept and give primacy to roles as wives and mothers, and required men to protect women in those roles. Decisions such as *Bradwell*, *Goesart*, and *Hoyt* expressly embraced the once commonplace notion that it was both constitutional and proper for the government to use the law as a means of requiring adherence to traditional gender norms.

B. This Court Has In Recent Decades Made Clear That The Equal Protection Clause Prohibits States From Requiring Adherence To Gender Stereotypes.

Notwithstanding a century of its former equal protection jurisprudence, this Court's more recent cases make plain that the Equal Protection Clause does not permit states to require adherence by either men or women to gender stereotypes.

See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (finding equal protection violation in a rebuttable presumption of dependency of female military spouses which was based on "gross, stereotyped distinctions between the sexes"); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (dismissing "old notions" of male and female roles in supporting a family as justification for gender classification); *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976) (finding equal protection violation in statute regarding purchase of alcohol that reflected "social stereotypes" about gender); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (invalidating gender-based distinction for payment of disability benefits that was based on "'archaic and overbroad' generalizations" about gender); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (holding unconstitutional a gender classification in an alimony statute that "carrie[d] with it the baggage of sexual stereotypes"); *Westcott*, 443 U.S. at 89 (invalidating a program providing benefits for children of unemployed fathers but not unemployed mothers as "part of the 'baggage of sexual stereotypes'"); *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994) (finding "an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice").

Indeed, the Court's most recent gender cases recognize that in meeting the burden of providing an exceedingly persuasive justification for gender classifications, the states "must not rely on overbroad generalizations about the different talents, capacities, or *preferences* of males and females." *VMI*, 518 U.S. at 533 (emphasis added). As the Court explained in *VMI*: "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550 (emphasis in original). Accordingly, the fact that most women would not care for an "adversative" model of education was held insufficient to deny those women who

desired and were capable of the demands of such teaching methods the benefits of attending the Virginia Military Institute. *Id.* at 550.

The Court employed similar reasoning in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), to strike down a state law prohibiting men from attending a state-operated nursing school. The Court there made clear that "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id.* at 724-25. Courts are required to determine the validity of gender classifications based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 726.

Thus, in evaluating the constitutionality of Section 21.06 under this Court's precedents, it does not matter whether most women would desire, even in the absence of criminal penalties, to form sexual and intimate relationships with men rather than women, or whether most men would desire to form sexual and intimate relationships with women rather than men. *Cf. J.E.B.*, 511 U.S. at 139 n.11 ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."); *Craig*, 429 U.S. at 202 (rejecting gender classification and noting prior cases' rejection of gender as a "decisionmaking factor" even where there were "predictive empirical relationships" between gender and regulations in question). The vast majority of women may never choose to go to a military academy, and the vast majority of men may not elect to pursue nursing as a career. The Equal Protection Clause, however, forbids the government from imposing on every woman, no matter what

her individual preference, what most women would like, or what society believes is a gender-appropriate desire. Equally, the state cannot compel all men to conform to what most men want, or to what society has determined is appropriately masculine. Just as a state cannot limit the opportunities for men to become nurses based on asserted notions of public morality and gender-appropriate behavior, so too is a state prohibited from making it a crime for a man to engage in intimate conduct with another man, or a woman to engage in intimate conduct with another woman, while permitting the same conduct between different-sex couples.

The heightened scrutiny that the Court has come to apply to gender classifications is based not on the notion that there are no differences between men and women, but rather that overbroad generalizations about those differences cannot justify restricting individuals to state-imposed, gender-based roles. *See VMI*, 518 U.S. at 533 ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."); *Orr*, 440 U.S. at 279 (state's "preference for an allocation of family responsibilities under which the wife plays a dependent role" is an invalid justification for sex-based classifications); *cf.* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1557 (1991) (noting the need to "recogniz[e] gender differences in a way that promotes equality and frees both women and men from traditional role limitations"). This Court has repeatedly held that states may not impose gender classifications based on the archaic stereotype that morality requires that women remain in the home; the Constitution similarly precludes Texas from employing such stereotypes – under the guise of

"morality" or otherwise – to dictate the roles women or men may fill in their intimate relationships in their homes.[3]

C. Prohibitions Of Sexual Intimacy Between Persons Of The Same Sex Enforce Gender Stereotypes.

Gender-based stereotypes animate laws such as Section 21.06 that prohibit sexual intimacy between persons of the same sex. Indeed, as explained below, prohibitions of same-sex intimate conduct should be understood to reflect "a reaction to the violation of gender norms, rather than simply scorn for the violation of norms of sexual behavior." Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 187.

One need look no further than the history of sodomy laws during the late nineteenth century – during the rise of a so-called "purity movement" in America – for evidence of the profound relationship between prohibitions of intimate sexual relations between persons of the same sex and a felt societal need to maintain rigid gender norms. Although sodomy laws were applicable then to all who committed the proscribed acts, it is no coincidence that such laws were expanded to include oral sex – and that municipalities across the country enacted prohibitions of cross-dressing – during the very period that saw the emergence in American popular understanding of the idea of the "homosexual" as a person characterized by gender "inversion." William N. Eskridge,

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[3] In the Title VII context, this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), similarly recognized that actions taken to enforce gender stereotypes may amount to impermissible sex discrimination. "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250 (plurality opinion); *id.* at 272-73 (O'Connor, J., concurring) (describing evidence that adverse employment decision was based in part on plaintiff's failure to conform to gender stereotypes as evidence of discriminatory conduct).

Jr., *Gaylaw: Challenging the Apartheid of the Closet* 25-27 (1999). "For both men and women, homosexual behavior came to be seen as a manifestation of 'inversion.' Effeminate men or masculine women violated the prescriptions of gender. The men particularly served as popular symbols of perversion and moral contagion." Law, *supra*, at 202; *see also* Byrne Fone, *Homophobia: A History* 346-48 (2000) (describing perceptions of homosexual men as effeminate, perverse, and potentially destructive of society). Fears of homosexuality were linked with Victorian America's resistance of the attempted entrance by the "New Woman" into the formerly male spheres of education and work; such intrusion was seen as "violat[ing] normal gender categories," as a "fus[ion of] the female and the male," and as "the embodiment of social disorder." Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* 265 (1985).[4] Thus, "[t]he purity movement reflected a heightened middle-class desire to reinforce traditional female gender roles in the face of a generation of 'new women,' educated and economically independent of men." Eskridge, *supra*, at 20.

Section 21.06 likewise embodies and enforces gender norms. Texas's prohibition of same-sex intimacy prescribes a

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[4] For example, in 1875, the Wisconsin Supreme Court justified the exclusion of women from the practice of law as necessary to preserve their purity and public decency:

> It would be revolting . . . that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce . . . . The habitual presence of women [in courts of justice] would tend to relax the public sense of decency and propriety.

Goodell, 39 Wis. at 246.

gendered standard of sexual behavior and proscribes deviation therefrom: men must not do what women are expected to do (engage in sexual intimacy with men), and women must not do what men are expected to do (engage in sexual intimacy with women). "Social science research generally confirms what social experience suggests: a strong aversion to homosexuality is correlated positively with endorsement of traditional sex-based stereotypes. Taboos against 'effeminate' men and 'unfeminine' women grow out of the same gender role assumptions that have limited opportunities for all individuals, irrespective of their sexual orientation." Deborah L. Rhode, *Sex-Based Discrimination: Common Legacies and Common Challenges*, 5 S. Cal. Rev. L. & Women's Stud. 11, 21 (1995).

Not only do the gender norms underlying same-sex intimacy prohibitions enforce gender stereotypes, but those stereotypes are also themselves deeply rooted in the devaluation of the "female." The stereotypes that make homosexuality's perceived affront to "proper" gender roles so potent are familiar ones that associate the female with the weak and contemptible. These stereotypes insist that men be dominant and that women be subordinate to men.[5] As one author explained:

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[5] In 1949, the writer James Baldwin argued that disdain for homosexuality was directly related to popular notions of the stereotypically masculine man, "whose attitude towards women is the wedding of the most abysmal romanticism and the most implacable distrust." James Baldwin, *Preservation of Innocence*, *in* Zero, Summer 1949, at 14, *reprinted in* Out/Look, Fall 1989, at 40, 43. According to Baldwin, the "debasement [of the homosexual] and our obsession with him corresponds to the debasement of the relationship between the sexes[;]. . . his ambiguous and terrible position in our society reflects the ambiguities and terrors which time has deposited on that relationship." *Id.*, *reprinted in* Out/Look, Fall 1989, at 41; *see also* Fone, *supra*, at 395 ("For Baldwin, homophobia . . . derived not just from hatred of homosexuality, but from sexism.").

> Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate to one's sex is the imputation of homosexuality. The two stigmas – sex-inappropriateness and homosexuality – are virtually interchangeable, and each is readily used as a metaphor for the other. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant; they appear to be guilty of some kind of insubordination.

Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 129 (1997); *see also* Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 844 (2002) ("Effeminate men and masculine women are often assumed to be homosexual, suggesting that gender and orientation are bundled in popular consciousness – to be gender atypical is to be orientation atypical and vice versa."); *cf.* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 21 (1994) (noting that even in "macho" cultures that stigmatize homosexuality less than the United States, "a sharp distinction is drawn between passivity and activity in sexual relations, and cultural understandings of passive and active operate in gendered terms. Thus, the passive role is both stigmatized and identified with femininity, whereas the active role is socially respectable and identified with masculinity."). By legally prohibiting men from being sexually intimate with other men, the state effectively enforces the notion that men must not "act like women" in a way that undermines the predominant view that men are fundamentally different from, and superior to, women. By legally prohibiting women from being sexually intimate with other women, the state

effectively enforces the notion that female sexuality exists solely for men and that women must not assume "masculine" roles that challenge the traditional view that they are naturally dependent on and subservient to men.

Recent same-sex sexual harassment cases under Title VII further demonstrate the culturally pervasive links between the debasement of stereotypically female traits, hostility toward those who break gender stereotypes, and the notion that sexual conduct between men entails men taking on debased "feminine" roles. Cases following *Hopkins* and this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (recognizing cause of action under Title VII for same-sex sexual harassment), have noted that sex discrimination may be at play where men suffer harassment because they are perceived as departing from gender "norms" by appearing or behaving in what is viewed as a feminine manner. The factual recitals in these cases are remarkably consistent. *See, e.g., Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 259-60 (3d Cir. 2001) (evidence of harassment included threats and use of physical force, as well as harasser calling plaintiff a "sissy" and repeatedly yelling at plaintiff, "everyone knows you're gay as a three dollar bill"), *cert. denied*, 534 U.S. 1155 (2002); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870 (9th Cir. 2001) (harassers referred to plaintiff as "she" and "her," mocked plaintiff "for walking and carrying his serving tray 'like a woman,' and taunted [plaintiff] in Spanish and English as, among other things, a 'faggot' and a '. . . female whore'"); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (harassing comments included "suck my dick," and "so you like it up the ass?"; "[p]ornographic photographs were taped to his work area, male dolls were placed in his vehicle, and copies of Playgirl magazine were sent to his home"); *cf. Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000) (holding that plaintiff had stated a cause of action for sex discrimination under the Equal Credit Opportunity Act by

alleging that defendant required plaintiff to conform to sex stereotypes before proceeding with a credit transaction). Women perceived as lesbians receive parallel treatment. *See Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (harassing comments by female employer to female employee included "I thought you were the man," "I thought you wore the pants," and "[who wore] the dick in the relationship").

The gender stereotyping at issue in Section 21.06 is as invidious as in the sexual harassment cases described above or the school admissions policies that this Court struck down in *VMI* and *Hogan*. Through imposition of criminal punishment, Section 21.06 seeks to enforce traditional norms of appropriate gender roles. At their core, these norms include the idea that sexual intimacy between two men is a sign of femininity and is debased; that women are to be sexually available to men and are not to express their own sexuality outside of an interaction with a man; and that transgression of gender norms is not merely unorthodox, but criminal. Thus, the statute Respondent defends enforces the very essence of sex-role stereotyping.

D. Gender-Based Criminal Statutes Warrant Particularly Careful Equal Protection Scrutiny.

Criminal prohibitions of consensual same-sex intimacy are particularly suspect because they use the threat of arrest, conviction, and punishment as the tools to enforce gender stereotypes. Courts must be especially vigilant in guarding against equal protection violations – and the harms they cause – in the criminal context. *See, e.g., McLaughlin*, 379 U.S. at 192 ("We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which . . . were intended to secure 'the full and equal benefit of all laws and proceedings for the security

of persons and property' and to subject all persons 'to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'"). As this Court has noted in the race context, "[a]t the very least, the Equal Protection Clause demands that racial classifications, *especially suspect in criminal statutes*, be subjected to the 'most rigid scrutiny.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis added). Gender classifications embedded in criminal statutes likewise merit careful and discriminating scrutiny.[6]

II. Section 21.06 Contains A Facial Gender-Based Classification.

Criminal liability under Section 21.06 turns on a gender classification apparent on the face of the statute. The conduct at issue in Section 21.06, "deviate sexual intercourse," is defined in a separate provision of the Texas Penal Code, Section 21.01(1), in gender-neutral terms as "any contact between any part of the genitals of one person and the mouth of or anus of another person," or "the penetration of the genitals or the anus of another person with an object." Tex. Penal Code Ann. § 21.01(1). It is undisputed that "deviate sexual intercourse," if performed between a man and a woman, is generally legal in Texas. *See Lawrence*, 41 S.W.3d at 357. Section 21.06 imposes criminal sanctions

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[6] As the analysis above suggests, sexual orientation is a characteristic tied to gender – that is, sexual orientation is defined in terms of the gender of person(s) to whom one is sexually or romantically attracted or with whom one is desirous of establishing sexual or romantic relationships. The sociological and physical reality of the interdependence between gender and sexual orientation warrants a closer look at existing distinctions in legal doctrine. As demonstrated herein, sexual orientation discrimination based on gender stereotyping can be understood as a form of gender discrimination warranting heightened scrutiny. In the present case, however, there is no need to decide this issue because, as explained in Part II of this brief, Section 21.06 expressly discriminates on its face on the basis of gender. Moreover, as explained in the Petitioners' Brief, the statute in any event does not survive even rational basis review.

only when "[a] person . . . engages in deviate sexual intercourse *with another individual of the same sex*." Tex. Penal Code Ann. § 21.06 (emphasis added).

Thus, under Section 21.06, criminality turns on the gender of the actors rather than the act. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 211 (1994) ("[I]f prohibited conduct is defined by reference to a characteristic, the prohibition is not neutral with reference to that characteristic."). To make a case under Section 21.06, a Texas prosecutor must prove the gender of each of the participants in the relevant conduct. In fact, gender is the key element of the crime, given that the underlying conduct is not illegal in Texas but for the gender of the participants. Thus, were the gender of either Petitioner Lawrence or Petitioner Garner different, neither of them would have been arrested, charged, convicted, and sentenced under Section 21.06.

A. Section 21.06's Operation With Respect To Gender Parallels The Operation Of Laws That This Court Long Ago Recognized As Facially Discriminatory On The Basis Of Race.

In defining criminality based on the actors' gender, Section 21.06 is akin to the statutes that this Court struck down decades ago for defining criminal conduct based on the actors' races. The seminal case, *McLaughlin*, concerned a Florida law that made it a crime for persons of different races habitually to spend the night in the same room together. *McLaughlin*, 379 U.S. at 185-87. The Florida Supreme Court had upheld the law under *Pace v. Alabama*, 106 U.S. 583 (1883), a case in which this Court had let stand a statute imposing more severe penalties for interracial fornication than for fornication between persons of the same race. *Pace*, 106 U.S. at 583-85. Rejecting the plaintiff's equal protection claim, the *Pace* Court had stated: "[The statute] applies the same punishment to both offenders, the white and the black.

Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. . . . The punishment of each offending person, whether white or black, is the same." *Id.* at 585.

McLaughlin unequivocally renounced the equal-discrimination reasoning of *Pace*. The *McLaughlin* Court explained: "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court. . . . Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation." *McLaughlin*, 379 U.S. at 188-91. As Justice Stewart explained in concurrence, the Florida law at issue criminalized conduct based on race despite its equal applicability to cohabiting persons of different races:

> These appellants were convicted, fined, and imprisoned under a statute which made their conduct criminal only because they were of different races. So far as this statute goes, their conduct would not have been illegal had they both been white, or both Negroes. . . . *I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious per se.*

Id. at 198 (Stewart, J., joined by Douglas, J., concurring) (emphasis added).

McLaughlin makes clear that statutes that classify conduct based on the race of the participants for the purpose of imposing criminal sanctions are statutes that classify on the basis of race, regardless of whether the statutes apply equally to blacks and whites. *Id.* at 191-92 ("[W]e deal here with a classification based upon the race of the participants . . . .").

The Court reaffirmed this principle in *Loving*, striking down a statute that criminalized interracial marriage. *Loving*, 388 U.S. at 4. The Court had no trouble concluding that the anti-miscegenation statute before it was based on a "racial classification," explaining: "*There can be no question* but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races." *Id.* at 11 (emphasis added). Section 21.06's selective prohibition of "deviate sexual intercourse" operates in the same manner with respect to gender: "deviate sexual intercourse" is "generally accepted" in Texas, but criminal "if engaged in . . . with another individual of the same sex." It should be beyond dispute that the principle animating *McLaughlin* and *Loving* – that courts should subject to rigorous scrutiny attempts by states to impose *criminal penalties* on the basis of race – applies with equal force to review of statutes under which criminal sanctions turn on gender.

This Court's reasoning in *McLaughlin* completely disposes of the conclusion of the Texas Court of Appeals below that Section 21.06 does not discriminate on the basis of sex because it does not disadvantage one gender relative to the other. *See Lawrence*, 41 S.W.3d at 359 (describing Section 21.06 as "gender-neutral on its face" on the ground that it "does [not] impose burdens on one gender not shared by the other"). Indeed, this Court has repeatedly rejected arguments that race- or sex-based classifications should be upheld because they apply equally to all races or sexes. *See, e.g.*, *McLaughlin*, 379 U.S. at 191; *Loving*, 388 U.S. at 8 (rejecting "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"); *see also Shelley v. Kraemer*, 334 U.S. 1, 21 (1948) ("Respondents urge . . . that since the state courts stand ready to enforce

restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws. . . . This contention does not bear scrutiny."); *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964) (holding unconstitutional a state law requiring the race of a candidate to appear on the ballot and rejecting the state's argument that "its Act is nondiscriminatory because the labeling provision applies equally to Negro and white"); *Westcott*, 443 U.S. at 84 (invalidating program providing support for children with both a father and a mother in the home where eligibility turned on gender of unemployed parent, and rejecting government's argument that program was not discriminatory because husband and wife in a potentially eligible family unit would be equally affected by a grant or denial of aid); *cf. Hunter v. Underwood*, 471 U.S. 222, 223 (1985) (holding unconstitutional as racially discriminatory an Alabama statute that mandated disenfranchisement of persons who committed "crimes of moral turpitude" and stating that the fact that the statute was intended to discriminate against poor whites in addition to poor blacks "hardly saves [it] from invalidity").

Texas's suggestion that Section 21.06 can escape equal protection scrutiny because it equally discriminates against women who choose female partners and men who choose male partners is fundamentally flawed. Such "equal application" does not negate the existence of an express gender classification here any more than did the "equal application" of the unconstitutional statute in *McLaughlin*.

B. Section 21.06 Facially Discriminates Based On Gender In Two Ways.

Like the statute struck down in *McLaughlin*, Section 21.06 facially discriminates on the basis of gender. It does so in two distinct ways. First, Section 21.06 facially discriminates based on the gender of the *defendant*. But for

the gender of Petitioner Lawrence, he would not have been charged, convicted, or sentenced under Section 21.06 for engaging in "deviate sexual intercourse" with Petitioner Garner. Rarely – and only in circumstances wholly absent here – has this Court upheld a statute that imposed criminal liability based on the gender of the defendant.[7]

Second, Section 21.06 also facially discriminates based on the gender of the defendant's chosen partner. But for the gender of Petitioner *Lawrence*, Petitioner *Garner* would not have been charged, convicted, and sentenced under Section 21.06 (and vice versa). In the race context, this Court has treated as obvious the notion that a statute facially classifies based on race if the statute expressly classifies based on the race of the defendant's third-party associate. For example, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court addressed a program that granted preferences to business owners who either were members of certain racial minority groups or subcontracted with members of those groups. The *Adarand* Court, in remanding for strict scrutiny review, specifically noted that the "case concerns only classifications based explicitly on race." *Adarand*, 515 U.S.

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[7] *Amicus* is aware of only one instance in which this Court upheld a statute under which criminality turned on the gender of the defendant: *Michael M. v. Superior Court*, 450 U.S. 464 (1981). *Michael M.* is readily distinguishable from the present case. First, the statutory rape law at issue in *Michael M.* was aimed at the protection of minors, unlike Section 21.06, which criminalizes conduct between consenting adults. Second, the *Michael M.* Court found that the gender-based classification at issue in that case related directly to physiological differences between men and women, namely, the capacity of women to become pregnant. No such argument can be made with respect to Section 21.06, which relates only to non-reproductive sexual conduct. Third, the 1981 majority opinion in *Michael M.* applied scrutiny there described as "the traditional minimum rationality test" with "'sharper focus,'" *id.* at 468, whereas the Court's current doctrine makes clear that the scrutiny required for facial gender-based classifications is heightened, not simply more sharply focused, *see VMI*, 518 U.S. at 533.

at 213. In other words, the *Adarand* Court recognized that a program that classified contractors according to the race of the business owners with whom they contracted created a racial classification. Similarly, Section 21.06 classifies a person who engages in certain intimate acts as either a criminal or a non-criminal according to the gender of the person's partner. Consistent with *Adarand*, Section 21.06 may be understood not simply as classifying based on the gender of the defendant, but also as classifying based on the gender of the defendant's chosen partner.

The Texas Court of Appeals, however, erroneously concluded that Section 21.06 includes no gender-based classification because "nothing in the history of Section 21.06 . . . suggest[s] it was intended to . . . perpetuate any societal or cultural bias with regard to gender." *Lawrence*, 41 S.W.3d at 358. This Court, of course, required no such showing in *McLaughlin*, and indeed, the Court of Appeals' reasoning conflates the two tests for determining whether a statute classifies based on gender. Under this Court's precedent, proof that Section 21.06 has a gender-discriminatory purpose is not necessary to establish that the statute *facially* classifies based on gender. *Cf. Adarand*, 515 U.S. at 213 ("We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." (citations omitted)).

In any event, as explained above in Part I of this brief, Section 21.06 causes gender-based harms by enforcing a state-sponsored view of gender-appropriate behavior. The clear function of the statute is to prescribe adherence to Texas's preferred sex roles and to prevent individuals from entering into intimate relationships that defy deeply rooted sex-role stereotypes. Like the statute in *Bradwell* that prohibited women from practicing law, Section 21.06 reinforces the antiquated notion that there are separate and

"natural" "spheres and destinies of man and woman." 83 U.S. at 141-42. Indeed, Respondent's effort to justify the law based on undefined notions of morality and family values has no meaning other than as a statement of the State's view that these traditional sex roles should be maintained.

III. Section 21.06 Cannot Survive Rational Basis Review, Let Alone The Heightened Scrutiny Applied To Gender Classifications.

Section 21.06 plainly cannot withstand even the most minimal standard of review under the Equal Protection Clause – for mere rationality – much less any heightened scrutiny. Texas's asserted interest in "preserving the public morals," *Lawrence*, 41 S.W.3d at 354, does not provide a legitimate government objective sufficient to justify Section 21.06's selective imposition of criminal liability on same-sex couples for the same conduct permissibly engaged in by different-sex couples. As explained above, this selective prohibition under the guise of morality serves no purpose other than the preservation of traditional gender roles, which this Court has made clear is not a defensible governmental purpose.

Without question, then, Section 21.06 cannot survive the heightened equal protection scrutiny applied to gender-based classifications. As explained by this Court in *VMI*, gender-based classifications are valid only if the government satisfies its burden of demonstrating that the challenged classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 533 (internal quotation marks omitted). The government must "demonstrate an 'exceedingly persuasive justification' for [its] action." *Id.* at 531. Texas's asserted morality justification for Section 21.06, however, is precisely the sort of purpose that this Court has condemned in its recent jurisprudence as serving to enforce overbroad gender stereotypes.

That the states may not enforce traditional gender roles certainly does not mean that the propagation of gender roles has no place in civil society. Gender roles are regularly developed and learned in families, religious institutions, and other segments of society. There is considerable variation, however, in the gender roles that different families and different religions inculcate. Government coercion, especially through imposition of criminal punishment, simply has no acceptable part to play in that process.

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Petitioners, this Court should reverse the judgment of the Texas Court of Appeals for the Fourteenth District.

Respectfully submitted,

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Supreme Court of the United States

JOHN GEDDES LAWRENCE AND
TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Texas Fourteenth District

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute is filing this brief in support of the petitioners. The parties in the case have consented to the filing of this *amicus* brief.[1]

SUMMARY OF THE ARGUMENT

This case is about the proper scope of and limits on government power more than it is about homosexuality or homosexual conduct. Texas asserts that it may criminalize a noncommercial, nonpublic, non-harmful activity between consenting adults in the privacy of their home for the sole reason that it believes that activity immoral. This brief asserts that Texas' statute exceeds the police power.

The petitioners and other *amici* will undoubtedly demonstrate that the lower court's decision should be reversed because the law in question is irrational, gives effect to private biases, and violates the right to privacy. This brief, however, addresses a different issue – the limits on government power. The brief urges this Court to ask not whether the defendants had the right to engage in their specific sexual activity but instead whether the

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

government has the power to prohibit it. We suggest that even before analyzing state action under one of the constitutional amendments, the Court first ask whether the contested government action falls within the police power. This approach provides an alternative to substantive due process analysis and is consistent with the approach of both our Founders and the leading Western jurists whose ideas underlay our political system.

The primary purpose of police power regulation is to protect individuals from harm. Even the government's purported interest in protecting public morality does not extend government power into the realm of private moral or immoral conduct. Indeed, legislative declarations demanding that people behave in certain ways in their private lives based on majority perceptions of what is moral destroy individual liberty.

Finally, Texas' statute cannot survive rational basis review. Bearing in mind the limits on the police power, the statute has no legitimate government purpose. Nor is it possible to show, or even inquire how, the statute relates to a legitimate government interest. With only a stark assertion of a moral claim, there are no facts and no relationship for a court to examine. The statute fails both prongs of the rational basis test and thus violates equal protection guarantees.

ARGUMENT

I. REGULATION OF CONSENSUAL, NONCOMMERCIAL, NONPUBLIC, NON-HARMFUL CONDUCT EXCEEDS THE POWER OF GOVERNMENT IN THIS COUNTRY.

A. This Court Should Ask Whether the State's Police Power Extends This Far, Not Whether the Defendants Have a "Right" to Engage in the Conduct at Issue.

This Court's decisions have long recognized that there is a private sphere beyond which no state may intrude.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (quoted in, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 758 (1985)).

Although it has recognized that there must be a realm of individual autonomy beyond state power, this Court has struggled to find a proper method and textual basis for defining that sphere. At different times, the Court has treated a person's interest in conducting his or her own affairs as aspects of the First Amendment, Fourth Amendment, and Fourteenth Amendment. *See, e.g.*,

Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (freedom of intimate association protected by First Amendment); *Katz v. U.S.*, 389 U.S. 347, 350-51 (1967) (Fourth Amendment protects reasonable expectation of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (discussing many possible bases for a right to privacy, including Fourteenth Amendment).

There is certainly a reasonable argument to be made for each of these textual bases.[2] Yet each seems somehow to miss the mark. The First Amendment analysis depends on the exact nature of the private activity at issue, while the Fourth Amendment inquiry usually turns on the government's investigative techniques.[3] Substantive due process depends largely on whether the liberty interest at

[2] We expect that other briefs will address these issues directly.

[3] Some scholars argue that the Ninth Amendment is the appropriate textual basis for the protection of private activity. *See* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1, 41-42 (1998) (analyzing relationship of Ninth Amendment to state regulation and arguing that state governments may not violate unenumerated rights). For a discussion of the application of the Ninth Amendment to state regulation of private sexual activity, see Mark Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. Rev. 85, 125-34 (2000); *see also Griswold*, 381 U.S. at 491-95 (Goldberg, J., concurring) (privacy rights may reside in Ninth Amendment). Our police power analysis does not require the Court to directly apply the Ninth Amendment. The limits on the police power – a power nowhere mentioned in the text – precede, underlie, and continue after the drafting of our Constitution and the Fourteenth Amendment. Here, we urge this Court to look at whether the state action falls within its police power before even attempting to place the legal challenge within the framework of a particular constitutional provision. If it fails this analysis, further inquiry is unnecessary.

issue has historically been treated as a "fundamental" right. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (expressing reluctance to add to the Court's short list of fundamental rights); *see also Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (commission of homosexual sodomy not a fundamental right, protected by time-honored tradition, and the government can therefore prohibit it).

The problem with these approaches, and particularly with the fundamental rights inquiry, is that there are countless private activities that are protected by no tradition or express constitutional provision. It would be unimaginable that they could be prohibited in a free society, even if some objection could be raised to them – cooking unhealthy meals, staying up too late, spending a slothful day drinking coffee and doing puzzles instead of accomplishing something productive. Indeed, almost anything that an ordinary person might spend his or her weekend doing, from gardening to cleaning to touching up house paint, would probably not qualify as a "fundamental" right. *See, e.g.*, Glen Reynolds & David Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 Hastings Const. L.Q. 511, 536 (2000) (criticizing approach of evaluating affirmative rights, rather than limits on government power). Yet such private activities, in the aggregate, are the essence of ordered liberty.

As detailed in the following section, our Founders and leading scholars throughout Western history all believed that there were limits on the power of government to intrude into the private activities of citizens. That basic understanding preceded, underlay, and continued after our Constitution. It is woven into the fabric of liberty in this country. This brief urges that this Court ask first whether

a government action falls within the legitimate scope of the police power, before it examines the nature of the liberty interest at issue.

B. In Our Political and Constitutional Tradition, Government Power Is Limited While the Number of Private Liberties Is Not.

Every political and legal scholar in our philosophical tradition has written about the need for limits on government power and the importance of preserving personal liberty. "Jefferson, Burke, Paine, Mill, compiled different catalogues of individual liberties, but the argument for keeping authority at bay is always substantially the same . . . to preserve our personal freedom." Isaiah Berlin, *The Proper Study of Mankind* 198 (Farrar Straus Giroux 1997).

Legislators are perfectly capable of invading liberty, and that is why government is limited:

> [T]he community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they should be so foolish or so wicked to carry on designs against the liberties and properties of the subject.

John Locke, *Two Treatises on Government* 197 (Hafner 1947) (1690).

The Founders fully adopted this view of the limits on government power and the broad scope of individual liberty. As Jefferson wrote:

> An elective despotism was not the government we fought for; but one which should not only be

> founded on free principles, but in which the power of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.

Thomas Jefferson, *Notes on the State of Virginia* (*quoted in The Federalist* No. 48 (Madison) at 278-79 (Clinton Rossiter ed., 1961)). The Founders believed the only way to prevent the danger of overreaching government action was to limit government power and give the judiciary the power to check legislative excesses. As Hamilton explained in Federalist 78, limitations on the legislative power:

> can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

The Federalist No. 78, *supra*, at 437. Indeed, that is the essential function of the federal judiciary as envisioned by the framers.

Rather than identify a long list of liberties to be protected from infringement by government, the drafters of the original Constitution advocated protecting liberty by establishing a government of limited and enumerated powers. When opponents to the proposed constitution objected that it lacked a bill of rights, defenders argued vociferously that any effort to enumerate rights would be both unnecessary and dangerous.

For example, James Wilson, a member of the Constitutional Convention, future member of the Supreme

Court, and professor of jurisprudence at the University of Pennsylvania, exclaimed "Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing." *Elliot's Debates*, Vol. II at 454 (Dec. 4, 1787) (2d ed., 1937) (1836-45); *see also id.*, Vol. IV at 316 (Jan. 18, 1788) (Charles Pinckney explaining that the drafters did not "delegate[] to the general government a power to take away such of our rights as we had not enumerated").

Future Supreme Court Justice James Iredell, speaking to the North Carolina ratification convention, cheerfully invited "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." *Id.*, Vol. IV at 167 (July 29, 1788).

As the debates on the Constitution show, the Founders were deeply concerned about the risks of delineating their liberties with specificity. During the debate on whether to adopt the Bill of Rights, Madison said that:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against.

James Madison, "Discussion of Drafts and Proposals to the Constitution," 1 Cong. 1789 (*quoted in The Complete Bill of*

Rights, 55 (Neil Cogan ed., Oxford 1997)). Madison responded to this objection by adding the Ninth Amendment and building the limited power of government into our constitutional structure.

The leading theorists of the 19th century also agreed that the police power had its limits. John Stuart Mill regarded each individual as having "a certain sphere of activity in his sole and exclusive possession. Within this sphere he is to exercise perfect freedom, unimpeded by the free action of any other human creature." J.S. Mill, *On Social Freedom* 40 (Columbia University Press 1941) (1873).

In his seminal work interpreting and explaining the Fourteenth Amendment, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* (Little, Brown and Company 1868), Thomas Cooley, then a justice on the Michigan Supreme Court and the Jay Professor of Law at the University of Michigan, sought to address the question of "whether the State exceeds its just powers in dealing with the property and restraining the actions of individuals." *Id.* at 572. His answer turned on the content of the police power, which he defined in light of previous judicial opinions as follows:

> The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is

> reasonably consistent with a like enjoyment of rights by others.

Id.

Whereas the protection afforded common-law rights by adjudication occurs after they have been violated, police power regulations seek to facilitate the exercise of these rights and prevent their infringement before the fact. Thus damage actions compensate for past rights violations, while police power regulations *prevent* rights violations from occurring.

Because the police power of a state is its power to protect the liberties of the people, the proper scope of that power is a function of and limited by those same liberties. There is no enumeration or list of specific state powers for much the same reason the founders thought rights could not be comprehensively listed. Just as all the ways that liberty may be exercised rightfully cannot be enumerated in advance, neither can all the specific ways that people may transgress upon the rights of others:

> It would be quite impossible to enumerate all the instances in which this power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in number and in variety.

Id. at 594.

Like the modern doctrine that views content-neutral time, place, and manner regulations of speech to be consistent with the First Amendment, the police power permits the states the authority "to make extensive and

varied regulations as to the time, place, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming into conflict with any of those constitutional principles which are established for the protection of private rights or private property." *Id.* at 597. The police power, then, can best be viewed as the legitimate authority of states to *regulate rightful* and *prohibit wrongful* acts.

After Cooley, the leading nineteenth century theorist of the police power was Christopher Tiedeman. In his *Treatise on the Limitations of Police Power in the United States* (F.H. Thomas 1886), he repeatedly relied on the power to prevent rights violations to identify reasonable and therefore constitutional exercises of the police power.

Like Locke, Tiedeman defines the legitimate purpose of government as the protection of rights. "The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights." *Id.* at 1-2. Government protects and develops these rights by preventing people from violating the rights of others. "The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. . . . The power of the government to impose this restraint is called POLICE POWER." *Id.*

C. Prevention of Harm Is the Prime Justification for Invoking the State's Ability to Use the Police Power.

Adam Smith wrote that "the first and chief design of all government is to preserve justice amongst the members of the state and prevent all encroachments on the individual in it, from others of the same society." Adam Smith, *Lectures on Jurisprudence* 7 (Oxford 1978) (1762-63). Mill was even more emphatic:

> [The principle of human liberty] requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.

J.S. Mill, *Autobiography and Essay On Liberty* 206 (Harvard University Press 1963) (1859).

Christopher Tiedeman concurred that the police power allowed the regulation of citizens' activities in order to prevent harm:

> Any law which goes beyond that principle [preventing harm] which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice.

Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* 4-5 (1886).

Following Tiedeman, a leading jurist of the early twentieth century, Ernst Freund, wrote that:

> Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests.

Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 511 at 546-547 (1904).

Even today, the prevention of harm is still the prime justification for the use of the police power. "In the absence of preventing harm . . . it is difficult to understand the assertion that [social] conformity is a value worth pursuing notwithstanding the misery and sacrifice of freedom which it involves." H.L.A. Hart, *Law, Liberty and Morality* 57 (Stanford University Press 1962).

Consistent with these jurists, the prevention of harm has been the traditional way that this Court has justified the State's use of the police power:

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals.

Lawton v. Steele, 152 U.S. 133, 137 (1894).

D. The Police Power Does Not Extend to the Promotion of Private Morality.

1. Traditionally, the police power allows regulation only of *public* morality.

We acknowledge that the promotion of public morality has been included as a part of the police power. But even under this description, the power extends only to *public* morality. *See, e.g., Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 429 (1935) ("police power embraces regulations designed to promote *public* convenience or the general welfare, and not merely those in the interest of *public* health, safety, and morals") (emphasis added). The State promotes public morality by providing for such things as education, lauding good conduct, and rewarding public service. In addition, the State is the guardian of public spaces such as streets and parks and may constrain conduct there, such as public fornication or intoxication. Such actions, though permitted behind closed doors, wrongfully interfere with the use and enjoyment of the public sphere by reasonable members of the community.

There is a crucial difference, however, between promoting public morality and protecting the sensibilities of reasonable members of the community while in the public sphere – something that falls under the police power of state – and criminalizing private consensual conduct that harms neither the individuals involved nor the general public – something that is outside the bounds of the police power. The State's power to promote public virtue and govern conduct in public spaces ends when individuals conduct their private lives behind closed doors in ways that harm no one. *Cf. People v. Onofre*, 415 N.E.2d 936, 941 (N.Y. 1980) (holding that law prohibiting sodomy by any unmarried persons did not advance public morality

and instead "impose[d] a concept of private morality chosen by the State").

Legal scholars of the police power agree that it is limited to the protection of public, not private, morality. Certainly, as discussed above, scholars like Cooley and Tiedeman rejected the notion that government could regulate private morality. More contemporary scholars agree. Prominent legal scholar H.L.A. Hart is certainly not known for his narrow view of government power. Yet he concluded that legislation like Texas' prohibition on private, consensual, noncommercial, non-harmful sexual conduct exceed the police power of government. "[T]he fundamental objection to coercing moral standards in private is that a right to be protected from the bare knowledge that others act immorally cannot be acknowledged by anyone who recognizes liberty as a virtue." Hart, *supra*, at 46. Isaiah Berlin, another respected scholar, explained "no public end can be promoted by restricting purely private conduct." Isaiah Berlin, *J.S. Mill and The Ends of Life* 192 (Oxford University Press 1969).

Indeed, even well-known conservative scholar John Finnis agrees that criminalizing such private sexual conduct lies outside the power of government. Finnis testified for the government at the trial court level in the case that became *Romer v. Evans* and believes that homosexuality is immoral, yet he concludes that, when conducted in private, it is a *private*, not public, moral issue.

> [I]t is one thing to maintain that the political community's managing structure, the state, should deliberately and publicly identify, encourage and support the truly worthwhile (including moral virtue) . . . It is another thing to maintain that that rationale requires or authorizes the

> state to direct people to virtue and deter them from vice by making even secret and truly consensual adult acts of vice a punishable offence against the state's laws.

John Finnis, *Law, Morality, and Sexual Orientation*, 69 Notre Dame L. Rev. 1049, 1076 (1994). Private morality simply lies beyond the police power.

2. In practice, government rarely attempts to legislate private morality.

Given that the police power traditionally extends only to the prevention of harm and the protection of morality in the public sphere, it is not surprising that instances of government attempts to regulate purely private, but purportedly immoral, conduct are few and far between. Indeed, the only other laws that appear to prohibit private, consensual, noncommercial, non-harmful activity are those prohibiting "fornication" or sex between unmarried persons and those prohibiting possession of obscenity.[4] While the Court has declined to rule on the constitutionality of fornication laws as applied to adults, *see Carey v. Population Services Int'l*, 431 U.S. 678, 694 n.17 (1977), we believe that fornication laws, like sodomy laws, exceed the boundaries of the police power.

The Court's treatment of obscenity plainly illustrates its skepticism on the extent of government power into the

[4] Other morally grounded restrictions involve commercial conduct (prostitution, sale of sexual devices), public conduct (public nudity, public sex), conduct with harmful effects (drug use), or conduct that violates a contract (adultery).

arena of purely private conduct. Obscenity receives very little protection by the First Amendment; indeed, it receives none at all within the public sphere. Commercial distribution of obscenity is not protected by the First Amendment, and states may lawfully prohibit its sale and distribution. *Roth v. United States*, 354 U.S. 476, 485 (1957). However, the Court struck down a prohibition against the mere possession of obscene material. *See Stanley v. Georgia*, 394 U.S. 557, 564-66 (1969). The Court held that what a person did in his home, without harm to others and with no commercial element, was immune from government regulation. *Id.* at 564 ("also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy"). In other words, the challenged statute was beyond the police power.

While premarital sex and possession of obscenity both occur within the private sphere, the prohibition against polygamy, discussed in the dissent to *Romer*, addresses *public* issues. *See Romer v. Evans*, 517 U.S. 640, 644-45 (1996) (Scalia, J. dissenting). It is legal in nearly every state, including Texas, for an unmarried man to live with more than one woman and even to engage in sexual relations with them.[5] Indeed, it does not become illegal polygamy until he seeks or asserts state sanction of more than one marriage. *See, e.g.*, Tex. Pen. Code § 25.01(a)(1)(B) & (b) (person commits bigamy by marrying

[5] Only a handful of states prohibit unmarried people from living together in a relationship. *See, e.g.*, Miss. Code Ann. § 97-29-1; N.D. Cent. Code § 12.1-20-10; Va. Code Ann. § 18.2-345. Texas does not prohibit such relationships.

another person or living with another person "under the appearance of being married," which is defined as "holding out that the parties are married"). It is the *holding oneself out to the public* and thus claiming that one has received government approval and all its attendant legal consequences that changes an otherwise legal arrangement into a criminal one.[6]

Polygamy may also give rise to various other harms, including difficulties with child and family support, complex problems of entitlement to state financial and tax benefits, and messy issues of inheritance and estate law. Even if each of these problems might be surmountable, they still necessitate the involvement of state enforcement and judicial action. Marriage intersects with the public sphere in innumerable ways, and thus laws applying to it are not solely an expression of pure moral sentiments.

While the police power may be broad, it extends only so far as an individual's actions have a deleterious, concrete impact on themselves or others. It does not extend to purely private, non-harmful activities that may be matters where there are moral disputes or different views, but no concern of the body politic as a whole. *Cf. Pennsylvania v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) (rejecting criminalization of certain private heterosexual conduct because enforcing "a majority morality on persons

[6] All states prohibit marrying another when one is already married. Some have laws stating simply that. *See, e.g*, Idaho Code § 18-1101. Some states have laws like Texas', while other states prohibit "purporting" to marry or cohabiting with another person when one is already married. *See, e.g.*, Georgia Code Ann. § 16-6-20; Utah Code Ann. § 76-7-101.

whose conduct does not harm others . . . . is not properly in the realm of the temporal police power").

E. A Free Society Cannot Allow a State to Forbid Private Behavior Based Solely on a Majority Opinion of Proper Moral Conduct, Like the One at Issue in this Case.

The lower court held that the Texas legislature "found homosexual sodomy to be immoral." *Lawrence v. State of Texas*, 41 S.W.3d 349, 356 (Tex. Ct. App. 2001). The court then held that this legislative declaration, alone, provided sufficient basis for the State to criminalize private, non-harmful conduct. *Id.* Texas made no claim that the defendants' activities caused any harm to anyone. Nor did Texas make any effort to explain how the regulation of private, consensual, non-commercial activity affects *public* morality. The lower court decision thus sets a breathtakingly dangerous precedent. If a legislative declaration of morality gives the State the power to invade peoples' homes and demand private conformity to majority norms, liberty can be invaded without any meaningful constraint.

The State, in its briefing below, admitted that the nature of such legislative declarations is capricious. The State declared that "morality is a fluid concept." State's Appellate Brief, Texas Court of Appeals, June 21, 1999 at 8. History is replete with examples of the legislative view of morality as "a fluid concept." Those who killed Socrates and Christ, for example, "perceived them to be purveyors of wicked falsehoods" and plainly immoral. Isaiah Berlin, *Four Essays on Liberty* 185 (Oxford University Press 1969). Such "fluid concepts" of morality are inconsistent with the rule of law and cannot support a wholesale invasion by government into the sphere of private action.

Liberty cannot survive if the legislature demands that people behave in certain ways in their private lives based on majority opinions about what is good or moral. Erasmus noted that "mere numbers in approval do not make for the justness of a measure." Desiderius Erasmus, *The Education of a Christian Prince* 221 (Trans. Lester Born, Norton 1964) (1540). Several centuries later, H.L.A. Hart stated that:

> Mill's essay *On Liberty*, like Toqueville's book *Democracy in America*, was a powerful plea for a clearheaded appreciation of the dangers that accompany the benefits of democratic rule. The greatest of the dangers, in their view, was not that in fact the majority might use their power to oppress a minority, but that, with the spread of democratic ideas, it might come to be thought unobjectionable that they should do so.

H.L.A. Hart, *Law, Liberty and Morality* 77-78 (Stanford University Press 1962). As Hart points out, the Nazi criminal code allowed for the punishment of any act that was contrary to "sound popular feeling." Act of June 28, 1935 (cited in Hart, *supra*, at 12).

And of course, the Founders believed wholeheartedly that majorities had no right to impose their beliefs on minorities. In Federalist 10, Madison articulated his concern:

> Complaints are everywhere heard from our most considerate and virtuous citizens, equally from friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the

> rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

The Federalist No. 10 (Madison), *supra*, at 48-49.

If private conduct is subject to majority approval, then there are no limits at all on the police power. Government would have the authority to ban or regulate all private, consensual sexual activities. It could outlaw unconventional sexual activity by married or unmarried opposite-sex couples.[7] Under the exact same justification as this law, it could ban same-sex hugging and hand-holding. *See Schochet v. Maryland*, 541 A.2d 183, 206 (Md. 1988) (Wilner, J. dissenting), *rev'd*, 580 A.2d 176 (Md. 1990). It could ban actions considered by nearly everyone to be immoral, like behaving as if nothing is wrong while planning to desert or infidelity in a nonmarital but purportedly monogamous relationship. It could ban other sexual activities considered by many to be immoral, like premarital sex. And it could ban activities considered by a minority of people (though perhaps a majority in some towns) to be immoral like singing, dancing, card-playing, or unmarried men and women socializing without their parents present.

Such prohibitions may sound unlikely, but the hope for government restraint and prudence has never been

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[7] While perhaps this Court would find the prohibition, as applied to married couples, to impinge unduly on marital relations, the prohibition would not actually fall outside the police power if the Court adopts the idea that the police power encompasses the ability to enforce moral opinions.

thought to be a sufficient safeguard for liberty. Certainly the Founders did not believe that.

> It is vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The Federalist No. 10 (Madison) at 48.

Rather than rely on the "vain" hope of government self-restraint, or "fluid concepts" of government power in the name of morality, this Court should determine whether this prohibition is within the police power of the State of Texas. To be within this power, the prohibited activity must have some tangible, real-world public effects. The statute must be shown to prevent harmful conduct or protect morality in the public sphere.

Here, the State of Texas may not ban purely private, noncommercial, non-harmful, consensual activity on the sole grounds that it doesn't like such activity. The state cannot simply redefine as "public" what is otherwise obviously private. That is what Texas has tried to do here, and for this reason, its statute exceeds the power of government.

II. TEXAS' STATUTE CANNOT SURVIVE RATIONAL BASIS REVIEW.

As explained above, this Court can and should hold that the Texas statute lies outside the police power. That ruling would eliminate the necessity to even examine the law under the rubric of rational basis review. A law can exceed the police power while still advancing a legitimate government interest. For example, both stress and poor eating habits have a negative effect on public health, which is typically considered a legitimate government interest. Yet under our earlier analysis, regulations requiring daily relaxation and healthy home cooking would exceed the limits of government power.

However, the police power analysis can also inform the application of the rational basis test.[8] In our political system, the police power extends to the prevention of harm and the protection of public morality. Texas' statute advances neither of those goals and no legitimate government interest. It is instead an attempt to impose a moral code on private behavior. Moreover, Texas' law has no factual relationship to any interest within the police power of government. For both of these reasons, it violates equal protection.

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[8] Rational basis scrutiny is traditionally associated with the Equal Protection Clause of the Fourteenth Amendment and this clause is indeed implicated by the differential treatment by this statute of persons of the same sex as compared with persons of different sexes. However, a rational basis for legislation must always exist, so this analysis applies also to, for example, Due Process and Commerce Clause cases as well.

A. The Texas Statute Does Not Advance a Legitimate Governmental Interest.

This Court has broadly defined what constitutes a legitimate government interest. Yet it also has recognized that there are some interests that a government may not lawfully pursue.[9] The overriding theme to all of these seemingly disparate rulings is that it is illegitimate to use the power of government to accomplish what are essentially private ends – whether those ends involve financial gain or the vindication of personal, private beliefs or prejudices. A law must have a legitimate *governmental* interest to survive constitutional scrutiny.

Legislation supported by a moral position alone, with no other justification, has no connection to the public interest. It simply enshrines a particular moral view.

[9] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (government bodies may not seek to force some people to pay for a public benefit when that burden should be borne by public as a whole); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (tax statute that discriminated against out-of-state insurers violated equal protection because "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (cities may not enact laws in order to cater to the prejudices of local citizens); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Zobel v. Williams*, 457 U.S. 55, 63 (1982) ("to reward citizens for past contributions .... is not a legitimate state purpose"); *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980) (government officials may not make crucial decisions affecting the rights of others when that decision may be colored with personal or institutional gain); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (bare desire to harm a politically unpopular group not a legitimate government interest).

Without any connection to the public sphere, the law becomes simply an exercise of *private* moral judgment. The question then becomes which faction will gain sufficient influence to convince the legislature to force others to comply with the particular moral view to which the faction ascribes. The whole structure of our society and Constitution is designed to prevent political war of faction against faction.

While certainly the judiciary should not judge between competing moral positions, a legislature also cannot make private choices for a minority of its citizens, unless their private moral choices cause some harm or have some impact on the public sphere. *Cf. Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (government does not have "the right to control the moral content of a person's thoughts").

As *Loving v. Virginia*, 388 U.S. 1 (1967), starkly demonstrates, majority sentiment cannot be the sole basis for legislation. Prior to the *Loving* decision, the majority of states in the United States had laws banning interracial marriage and a majority of people supported such laws. *See Naim v. Naim*, 87 S.E.2d 749, 754 (1955), *vacated on other grounds*, 350 U.S. 891 (1955). The fact that a majority holds a particular moral belief or that the belief has been consistent in our history cannot, without more, serve to sustain a law. Forcing private compliance with a particular moral position, even one of a majority of citizens, simply is not a legitimate purpose of government.

B. It Is Impossible to Analyze Whether the Texas Statute is Rationally Related to its Goals.

Even in the absence of finding a fundamental right, this Court still requires that there be an actual connection, grounded in facts, between a legitimate governmental purpose of a regulation and the real world. *See Romer v. Evans*, 517 U.S. 620, 633-35 (1996). Looking at that connection allows courts to evaluate if the law is rational. This analysis of the factual connection between a law and its purpose appears in all rational basis cases, whether the Court upholds or strikes down the law in question. This Court applied the same type of rational basis analysis in both *Glucksberg* and *Cleburne*, but it was unable to perform that analysis in *Bowers* and it cannot apply it here.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), this Court first rejected the notion that there is a fundamental right to assisted suicide and then analyzed whether Washington's prohibition against assisted suicide survived rational basis analysis. The Court identified a number of specific state interests including preserving and protecting life, *id.* at 728-29, protecting the integrity and ethics of the medical profession, *id.* at 731, protecting vulnerable groups from pressure and prejudice, *id.* at 732, and preventing any potential movement toward euthanasia, *id.* at 733. It also discussed how, *as a factual matter*, the prohibition against assisted suicide related to these legitimate government interests, referring to various studies and other materials. *Glucksberg* thus follows the classic pattern of the rational basis test: identifying the legitimate governmental interest and then connecting the prohibition to those interests.

Examining the connection of the law to its purpose also allows the Court to make sure that the law was not enacted for an improper purpose. In *Cleburne*, for instance, while the government claimed at least some legitimate purposes, promoting certain zoning and safety regulations, the fact that the city permitted all sorts of other similar businesses in the same area but attempted to ban only this one indicated that the motives were in fact dislike toward a particular group of people, rather than the purported legitimate interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-6 (1985).

There is no way to evaluate the rationality of a law without some kind of connection to facts. *Bowers v. Hardwick*, 478 U.S. 186 (1986) perfectly illustrates the dilemma caused by legislation that is grounded solely on assertions about private morality. The rational basis analysis takes up a single paragraph of the opinion. It states that "majority sentiments" are an appropriate basis for legislation and concludes that the statute survives rational basis analysis.[10] *See id.* at 196. The only inquiry in *Bowers* was whether the legislature could legitimately condemn homosexual sodomy. Once the Court decided that "majority sentiments" were a valid basis for legislation, that

[10] The *Bowers* majority opinion also asserts that there are many laws that represent moral choices. *Id.* However, the opinion earlier identifies only the prohibitions against adultery, incest, and other sexual crimes. *Id.* at 196. Adultery breaches a marriage contract and harms another party. Sexual crimes like rape or sex with children of course also harm another person, and, as discussed in the *Bowers* dissent, even adult incest is prohibited because the closeness of family relationships make true consent almost impossible. *Id.* at 209 n.4 (Blackmun, J., dissenting).

ended the inquiry. Moral sentiment is an interest incapable of refutation. It isn't falsifiable, at least not in a court of law.

The *Bowers* court did not, and indeed could not, examine "the relation between the classification adopted and the object to be attained." *See Romer v. Evans*, 517 U.S. 620, 631 (1996). The Texas appellate court followed the same rubric, holding that morality was a legitimate basis for legislation and not attempting to look at the relationship of the law to its purpose. *Lawrence v. State of Texas*, 41 S.W.3d 349, 356 (Tex. Ct. App. 2001). The conflation of the two parts of the rational basis test, while improper, is certainly understandable. There are no facts to which a court could refer, because the legislation has no goal other than the codification of majority sentiment. If there is no objective way to determine where state power ends other than what the majority wants, then the law is self-justifying. It is not possible to subject such a law to rational basis analysis, and thus laws like this one avoid judicial scrutiny altogether.

In contrast, objective judicial analysis can occur when the government must assert a legitimate governmental interest – an interest in preventing harm or governing activity in the public sphere – and must use facts to support a rational relationship between the law and its purpose. Legislation with an exclusively moral purpose is impervious to rational basis analysis, and that fact in itself indicates that the law is not legitimate.

CONCLUSION

We urge that the Court begin by looking at whether the contested government action falls within the police power. If the law does not address an activity that causes harm or impacts the public, it is beyond the power of the government to regulate, regardless of whether the specific liberty interest is deemed fundamental. Texas' statute attempts to regulate purely private morality and thus exceeds the police power. Furthermore, we ask this Court to find that the imposition of private moral beliefs is not a legitimate basis for legislation. Because such legislation cannot be tested in any objective fashion under the rational basis test, it is unconstitutional and cannot survive.

Respectfully submitted,

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In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

BRIEF *AMICUS CURIAE* OF UNITED FAMILIES INTERNATIONAL IN SUPPORT OF RESPONDENT

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Interest of *Amicus Curiae*[*]

United Families International (UFI) is a non-sectarian 501(c)(3) public charity based in Gilbert, Arizona. UFI, which was founded in 1978, seeks to maintain and strengthen the family unit in the United States and other countries by promoting traditional marriage, parental rights, cultural values, the rights of unborn children and national sovereignty. UFI has been granted official consultative status at the United Nations as a non-governmental organization, and has participated in numerous population conferences worldwide.

Recognizing that the family is the natural and fundamental group unit of society and should be accorded the widest possible protection and assistance, and that families worldwide include both nuclear and single-parent families, UFI is committed to supporting those measures designed to maintain and strengthen the family by promoting respect for marriage between man and woman, founded on chastity before marriage and fidelity in marriage; the sanctity of human life, including the unborn; the right and obligation of parents to love, protect, provide for, and teach their children; existing laws, political structures and cultural norms that preserve and promote the family; and compassion for the disadvantaged and distressed, including orphans and street children.

UFI believes that a ruling by this Court extending protection to homosexual acts of sodomy would ultimately lead to judicially-mandated recognition of same-sex "marriage," which would irretrievably undermine the institution of marriage in this country. To assist the Court in addressing the issues presented by this case, *amicus* submits this brief.

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

During the oral argument in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justice Souter asked the Solicitor General whether the Court's adoption of the rational-basis standard of review for abortion regulation would allow the States to prohibit all abortions (except to save the mother's life). When the Solicitor General replied that it was best not to answer such a question in the abstract, Justice Souter pressed him on the matter stating, "[y]ou're asking the Court to adopt a standard, and I think we ought to know where the standard would take us."[1] So, too, in this case, the Court needs to know where adoption of petitioners' proposed standards for reviewing the Texas sodomy statute, TEXAS PENAL CODE § 21.06 (West 1994), would take the Court and the Nation.

Affirming the Texas Court of Appeals would leave in place a small misdemeanor fine ($200.00) for engaging in conduct that the State of Texas almost never prosecutes and which few other States criminalize, much less prosecute, as petitioners and their *amici* readily acknowledge. Reversing the lower court, however, will inevitably lead to a demand that the States recognize same-sex marriage, a demand which, given the logic of petitioners' arguments in this case, would be difficult to deny should they prevail here. In their petition for writ of *certiorari*, petitioners claimed that "this case does not present questions concerning formal recognition or affirmative support of gay and lesbian couples and their children." Pet. at 30. Having obtained review, that disclaimer has vanished from their brief on the merits.

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[1] 216 Kurland & Casper, LANDMARK BRIEFS & ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 1991 Term Supplement at 1218.

On the surface, this case may appear to concern only the authority of the State to define as criminal sexual acts between members of the same sex. But that appearance is deceptive. At a deeper level, it is about the law's ability to draw *any* distinctions between heterosexual and homosexual relationships and to recognize the former, but not the latter, in the institution of marriage The public policy choice of Texas and every other State that restricts marriage to a relationship between one man and one woman would not long survive a decision by this Court holding that there is a due process liberty interest in engaging in homosexual acts of sodomy, or a holding that equal protection principles blind the States from seeing any differences between heterosexual and homosexual behavior. For its own sake and for the sake of the American People from whom it ultimately derives its authority, the Court should not start down that road.

1. This is not an appropriate case in which to decide the questions presented. Petitioners ask this Court to recognize a fundamental liberty interest of adults to engage in consensual same-sex acts of sodomy in private, and to hold that a law that distinguishes between same-sex and opposite-sex acts of sodomy violates equal protection principles. Yet, the record of petitioners' pleas of *nolo contendere* to the charges of committing deviate sexual conduct (anal intercourse) does not exclude the possibility that their conduct was nonconsensual, commercial or even public, all of which petitioners concede the State may prohibit, as it does with opposite-sex conduct. Because the conduct of which petitioners were convicted may not have been entitled to constitutional protection, even on their theory of liberty and privacy, and, therefore, would have been subject to prosecution regardless of the sex of the participants, the writ of *certiorari* should be dismissed as having been improvidently granted.

Assuming that the writ is not dismissed, *amicus* submits that petitioners have provided this Court with no principled basis on which it could accept either their due process or their equal protection arguments.

2. Petitioners' attempt to discover a fundamental liberty interest (or right) of adults to engage in sexual conduct outside of marriage is unavailing. None of the three "aspects of personal liberty" on which they rely supports recognition of such an interest. Petitioners' extraction of an abstract right to "intimate relationships" from the Court's contraception cases ignores unambiguous statements in those (and other) cases either rejecting a right to engage in sexual conduct outside of marriage or declining to announce such a holding. The individual's interest in "bodily integrity" is similarly inapplicable. That interest is primarily concerned with "limits on governmental power to mandate medical treatment or to bar its rejection." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). But that interest does not confer upon a person a right to do whatever he wants to do with his body, a "right" that was rejected by the Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Finally, the undisputed interest persons have in "the privacy of the home" does not place whatever they do in the home beyond the reach of the criminal law. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986); *Stanley v. Georgia*, 394 U.S. 557, 568 n.11 (1969).

3. Petitioners' equal protection argument claim rests on a number of erroneous assumptions, the principal one of which is that § 21.06 classifies persons on the basis of their sexual orientation. Upon examination, § 21.06 clearly classifies conduct, thus rendering moot petitioners' equal protection argument. Even assuming that the statute may be said to discriminate against homosexual, as opposed to heterosexual, conduct, that discrimination is not unconstitutional.

Neither this Court nor any court of appeals has held that classifications based on one's sexual orientation are subject to heightened scrutiny under the Equal Protection Clause. And ten of the thirteen courts of appeals have held (or strongly implied) otherwise. Moreover, whether sexual *orientation* (as opposed to conduct) is a legitimate basis for classification is a question not fairly raised in this case because § 21.06 does not purport to define as criminal the *status* of one's sexual orientation. The prohibition of same-sex, but not opposite sex, acts of sodomy is rationally related to one or more legitimate state interests, including the State's belief that sexual conduct between members of the same sex is immoral and should be discouraged. Nothing in this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), properly understood, forbids the State from making that choice.

ARGUMENT

I. THE COURT SHOULD DISMISS THE WRIT OF *CERTIORARI* AS HAVING BEEN IMPROVIDENTLY GRANTED.

As a threshold matter, *amicus curiae* submits that, on the basis of the record presented, this case does not present a suitable opportunity for reaching the constitutional claims petitioners have raised. Accordingly, the writ of *certiorari* should be dismissed as having been improvidently granted.

Petitioners challenged § 21.06 both on its face and as applied to "consensual, adult, private sexual relations with another person of the same sex." Pet. App. at 117a-118a, 121a-122a, 130a-131a, 134a-135a. Petitioners do not dispute that, consistent with the Constitution, the State of Texas may prosecute same-sex acts of sodomy committed in public, for compensation, without consent or with minors. Pet. Br. at 3,

22 n.16. Although other provisions of the Texas Penal Code might better describe some or all of these offenses, they also fall within the scope of § 21.06. *See Torme v. State*, 525 S.W.2d 9 (Tex. Crim. App. 1975). The statute, therefore, cannot be said to be unconstitutional on its face, *i.e.*, in all of its possible applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because petitioners do not claim that all conceivable applications of § 21.06.would be unconstitutional, this case does not present a valid facial challenge. Nor does it present an appropriate as-applied challenge.

Petitioners entered pleas of *nolo contendere* to the charges once their motions to quash the complaints were denied. Although the sketchy record does confirm that petitioners are adults, it provides no basis for determining whether either petitioner was compensated for engaging in an act of sodomy, whether the act was consensual or even whether the police were allowed (or expected) to observe the act following their entry into petitioner Lawrence's home (an apartment), thereby destroying its private nature. Because the record does not exclude the possibility that the act was compensated, nonconsensual or, in some constitutionally relevant sense, public, this is not an appropriate case to reach the constitutional claims raised by petitioners. For that reason, the writ of *certiorari* should be dismissed as having been improvidently granted. *See International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers Union v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948) (*per curiam*) (dismissing appeal without prejudice and declining "to decide the Constitutional issues" raised "[b]ecause of the inadequacy of the record").

II. NOTHING IN THE LIBERTY LANGUAGE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PREVENTS THE STATE OF TEXAS FROM PROHIBITING SAME-SEX ACTS OF SODOMY.

In their argument based upon the Due Process Clause, petitioners assert that "adults have fundamental liberty and privacy interests in making their own choices about private, consensual sexual practices." Pet. Br. at 11. They purport to derive such interests from the "convergence" of "well-established protections for intimate relationships, bodily integrity, and the privacy of the home." *Id.* And they insist that it is only this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that stands between them and recognition of those interests. Pet. Br. at 29 ("[v]indication of Petitioners' constitutionally protected liberty interests should not be blocked by continued adherence to *Bowers*").

Petitioners' claims do not withstand scrutiny. Upon careful examination of the Court's precedents, it becomes evident that none of the "three . . . aspects of personal liberty" on which petitioners rely (*i.e.*, "intimate relationships," "bodily integrity" and "the privacy of the home"), Pet. Br. at 11, supports their thesis that "adults have a fundamental interest in consensual sexual intimacy," *id.* at 19, regardless of the nature of the sexual acts involved or the marital status of the parties. Thus, even if *Bowers* had not decided the precise due process issue raised here, petitioners' argument that there is a fundamental liberty (or privacy) interest in engaging in same-sex acts of sodomy would find no home in the Court's prior decisions. Moreover, *Bowers* should not be overruled because it is fully consistent with this Court's jurisprudence in evaluating asserted liberty interests under the Due Process Clause. Petitioners' due process argument should be rejected.

A. There Is No Fundamental Liberty Interest In Engaging In Sexual Acts Outside Of Marriage.

Intimate Relationships

Petitioners initially claim that the prohibition of same-sex acts of sodomy unconstitutionally interferes with their "intimate relationships." Pet. Br. at 11-13. Contrary to the implications in their brief, however, this Court has never held that there is a constitutional right of adults to engage in sexual relations outside of marriage, *see Carey v. Population Services International*, 431 U.S. 678, 694 n.17 (1977) (the Court "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual behavior] among adults"), or that prohibitions of such conduct must satisfy the strict scrutiny standard of review, *id.* at 688 n. 5 (declining to hold that state regulation must meet this standard whenever it implicates "sexual freedom" or affects "adult sexual relations"); *id.* at 705 (Powell, J., concurring in part and concurring in the judgment) ("[n]either our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting 'compelling state interest' standard whenever it implicates sexual freedom").[2] Indeed, the Court has strongly intimated that such conduct is *not* entitled to constitutional protection.

Thus, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court characterized as "unsupportable" the claim that its prior cases concerning childrearing and education, family relationships, procreation, marriage, contraception and abor-

[2] *See also Carey*, 431 U.S. at 702 (White, J., concurring in part and concurring in the judgment) (opinion does not affect the power of States to forbid premarital or extramarital sexual relations).

tion "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription." *Id.* at 191.[3] And in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court rejected petitioners' argument that "conduct which directly involves 'consenting adults' only has, for that sole reason, a special claim to constitutional protection." *Id.* at 68. While acknowledging that the Constitution "establishes a broad range of conditions on the exercise of power by the States," the Court refused to hold that "conduct involving consenting adults only is always beyond state recognition," citing, *inter alia*, laws against adultery and fornication. *Id.* at 68 & n. 15.[4] Nor do the Court's contraception cases lend any support to petitioners' assertion of an untrammeled liberty interest in engaging in sexual relations outside of marriage.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, observed that "[t]he State of Connecticut does have statutes, *the constitutionality of which is beyond doubt*, which prohibit adultery and fornication." *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring) (emphasis supplied). Justice

[3] The dissenters in *Bowers* recognized the authority of the State to proscribe adultery and incest. *See Bowers*, 478 U.S. at 209 n.4 (Blackmun, J., dissenting), 217 (Stevens, J., dissenting).

[4] Among the cases cited in *Slaton* were *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (fornication and adultery statutes "express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not" and, if enforced, "would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State"), and *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916) ("[a]dultery is an offense against the marriage relation, and belongs to the class of subjects which each State controls in its own way").

Goldberg stressed that "the Court's holding today . . . in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." *Id.* at 498-99. Justice White expressed the view that "the State's policy against all forms of promiscuous or illicit sexual relations, be they premarital or extramarital," was "a permissible and legitimate interest." *Id.* at 505 (White, J., concurring in the judgment). Justice Stewart, joined by Justice Black, noted in dissent that "even after today a State can constitutionally still punish at least some offenses which are not committed in public." *Id.* at 530 n.7 (Stewart, J., dissenting). Thus, in *Griswold*, *six* Justices *confirmed* the authority of the State to prohibit sexual relations outside of marriage, and *no* Justice *disputed* that authority.

In *Griswold*, Justice Goldberg relied upon Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds). *See Griswold*, 381 U.S. at 499, quoting *Poe*, 367 U.S. at 553. In *Poe*, Justice Harlan expressly acknowledged the State's authority to prohibit fornication, adultery, homosexuality and incest. 367 U.S. at 545-48, 552-56. *Apropos* of petitioners' claims here, Justice Harlan stated:

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, *confining sexuality to lawful marriage*, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Id. at 546 (citation omitted) (emphasis supplied).

Petitioners would not "build upon that basis," but seek to undermine it. That effort should be resisted. "The right of privacy," Justice Harlan emphasized, "most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, *however privately practiced*." *Id.* at 552 (emphasis supplied). Justice Harlan's dissent in *Poe* was clearly concerned with the *means* of regulating the details of intimacy in a relationship (*i.e.*, marriage) that the State itself sanctions and protects, as opposed to those "sexual intimacies" which the State forbids altogether," such as "[a]dultery, homosexuality and the like." *Id.* at 553.

> It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Id.

No decision of this Court recognizes a right of adults to engage in "intimate relationships" outside of marriage.[5] Petitioners' alternative grounds for recognizing a "fundamental interest in consensual sexual intimacy" fare no better.

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[5] As the Court's opinion in *Carey v. Population Services, International* makes clear, 431 U.S. at 685, its earlier opinion in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), was concerned with "[t]he decision whether or not bear or beget a child," a concern not implicated by § 21.06, and not whether there is an independent right to engage in sexual relations outside of marriage. Nowhere in *Eisenstadt* did the Court question the State's authority to proscribe fornication or adultery. Indeed, the State's authority to do so was conceded. 405 U.S. at 447-50.

Bodily Integrity

Petitioners claim that the prohibition of same-sex acts of sodomy impermissibly interferes with their "bodily integrity." Pet. Br. at 13-14. The Court has decided a series of cases that, taken together, fairly could be said to recognize a liberty interest in "bodily integrity," particularly as it relates to unwanted medical treatment or commitment.[6] Nevertheless, it is not at all clear how a law *forbidding* (as opposed to one

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[6] *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) ("[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions," citing, *inter alia*, *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (upholding compulsory vaccination statute)). *See also Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (forcing antipsychotic medication upon a pre-trial detainee requires an "overriding justification and a determination of medical appropriateness"); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (person "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs"), *id.* at 229 ("[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"); *Vitek v. Jones*, 445 U.S. 480, 487-94 (1980) (involuntary transfer of prisoner to mental hospital implicates a liberty interest protected by the Due Process Clause); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Youngberg v. Romeo*, 457 U.S. 307, 315-16, 319 (1982) (involuntarily committed mental patients have right to "safe conditions" and "freedom from bodily restraint"); *Parham v. J.R.* 442 U.S. 584, 600 (1979) (setting standards for voluntary admission of minor children to mental hospitals by parents or guardians); *Winston v. Lee*, 470 U.S. 753, 758-66 (1985) (State could not compel defendant to undergo surgery under general anesthetic to remove a bullet lodged in his chest which could constitute evidence of a crime) (Fourth Amendment); *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (deciding permissibility of withdrawing blood sample to determine intoxication of driver); *Rochin v. California*, 342 U.S. 165 (1952) (Due Process Clause forbade stomach pumping to obtain proof of intoxication).

mandating) same-sex acts of sodomy could possibly contravene that interest. This Court's "cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection," *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992),[7] have little, if anything, to do with the authority of the State to prohibit certain types of sexual conduct, especially when the conduct itself may entail substantial health risks to those who engage in it.

Privacy of the Home

Finally, petitioners claim that the prohibition of same-sex acts of sodomy improperly interferes with the privacy of the home. Pet. Br. at 14-15. This line of cases does not support petitioners' argument, either. Petitioners disclaim any challenge to the circumstances under which the police entered their home and observed their homosexual conduct. *Id.* at 14-15. Hence, their reliance on the Court's Fourth Amendment decisions is misplaced. The Fourth Amendment places no limits on *what* conduct may be made criminal, only on the *means* by which evidence of that conduct may be obtained.[8]

The sanctity of the home is an exceptionally important constitutional and societal value, but it is not a shield for

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[7] In *Casey*, the Court observed that restrictions on abortion may affect "the very bodily integrity of the pregnant woman," *id* at 896, which, of course, cannot be said of restrictions on sodomy.

[8] Contrary to the Brief of *Amici Curiae* Constitutional Law Professors (at 16), the Court has understood its decision in *Stanley v. Georgia*, 394, U.S. 557 (1969), holding that possession of obscene materials in the privacy of the home could not be made a criminal offense, to be "'firmly grounded in the First Amendment,'" not the Fourth. *See Osborne v. Ohio*, 495 U.S. 103, 103 n.3 (1990) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986)).

criminal conduct:

> Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* [*v. Georgia*, 394 U.S. 557 (1969)] itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods.

Bowers, 478 U.S. at 195, citing *Stanley v. Georgia*, 394 U.S. at 568 n.11. *See also Osborne v. Ohio*, 495 U.S. 103, 108-11 (1990) (distinguishing *Stanley* and upholding the authority of the State to proscribe the possession and viewing of child pornography even in the privacy of the home).

Petitioners do not claim that "ordinary criminal conduct may find refuge in the home," only that privacy interests are implicated here because the home "is the place where most intimate associations are centered." Pet. Br. at 15 n.9 (citation and internal quotation marks omitted). But, even if, as in *Bowers*, petitioners' "submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." *Id.* at 195-96. Neither petitioners nor their *amici* have provided the Court with any principled basis on which it could distinguish sodomy from adultery, incest (between adult relatives), group sex or even prostitution, all of which may be committed in the privacy of the home. Indeed, petitioners' formulation of the interest they seek the Court to recognize does not admit of such distinctions. *See* Pet. Br. at 19 ("adults have a fundamental interest in consensual sexual

intimacy"). Nor do the formulations of the asserted interest (or right) by their *amici*.[9] If the liberty interest *is* fundamental, then *any* restrictions on its exercise would have to meet the strict scrutiny standard of review, *Reno v. Flores*, 507 U.S. 292, 302 (1993) (Fourteenth Amendment's guarantee of due process "forbids the government to infringe . . . 'fundamental' liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest") (emphasis in original), as petitioners and their *amici* freely admit. Pet. Br. at 26 ("Section 21.06 furthers no compelling interest").[10] That, however, would work a major (and unwarranted) change in the Court's jurisprudence.

Nothing in the liberty language of the Due Process Clause of the Fourteenth Amendment confers a right to engage in sexual relations outside of marriage, and petitioners have identified no cases of this Court holding otherwise.

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[9] *See, e.g.*, Brief *Amici Curiae* of the ACLU the ACLU of Texas at 2 (the Due Process Clause "protects the liberty of consenting adults to decide what sexual intimacies they will share in private"); Amicus Brief of Human Rights Campaign, *et al.*, at 2 ("the right to be free from governmental intrusion into, and criminalization of, private sexual relations between consenting adults"); Brief of *Amici Curiae* Constitutional Law Professors at 11 ("the right to make decisions about the nature of their private, consensual sexual relationships with other adults free from state interference"); Brief *Amicus Curiae* of the ABA at 16 ("an adult's right to engage in private, consensual intimate conduct is a component of liberty protected by the Due Process Clause").

[10] *See also* Brief *Amici Curiae* of the ACLU and the ACLU of Texas at 4 ("the government must provide a compelling justification before it may dictate the content of personal decisions regarding sexual intimacy"); Brief *Amicus Curiae* of the ABA at 14-15 ("intimate sexual conduct between two consenting adults that occurs in the privacy of the home should not be the basis of a criminal conviction absent some truly compelling government interest").

B. The Prohibition Of Same-Sex Acts Of Sodomy Is Rationally Related To One Or More Legitimate State Interests.

Where, as here, the challenged statute does not implicate a fundamental right, there is no need "for complex balancing of competing interests" and it may be upheld if it possesses "a reasonable relationship to a legitimate state interest." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).[11] *Amicus* anticipates that respondent and other *amici* will discuss in more detail the various legitimate state interests the Texas sodomy law promotes. Nevertheless, *amicus* must respond to the contention of petitioners that legislation may not be based on notions of morality. *Bowers*, of course, held that the Georgia sodomy statute could be based on the belief that such conduct is immoral: "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. at 196. This was not an isolated or even an unusual holding. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (the police powers of the State extend to "public health, safety and morals") (plurality opinion); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[p]ublic safety, public health, morality, peace and quiet, law and order–these are some of the most conspicuous examples of the traditional application of the police power"). Neither petitioners nor their supporting *amici* cite a single decision of the Court holding that notions of morality--public or private--may not serve as a basis for legislation.

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[11] For that reason, the Court need not engage in the "balancing of competing interests" petitioners attempt in their brief. *See* Pet. Br. at 25-29.

In his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan observed that "society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well." *Id.* at 545-46. To attempt to draw a line "between public behavior and that which is purely consensual or solitary," as petitioners advocate, allowing state regulation of the former but not the latter, "would be to withdraw from community concern a range of subjects with which every society in civilized time has found it necessary to deal." *Id.* at 546. No such line-drawing is required by this Court's decisions or the Constitution.

C. *Bowers v. Hardwick*, 478 U.S. 186 (1986), Should Not Be Overruled.

Petitioners and their *amici* mount a vigorous attack on *Bowers v. Hardwick*, 478 U.S. 186 (1986), demanding that it be overruled. Pet. Br. at 29-32; Brief *Amici Curiae* of the ACLU and the ACLU of Texas, Brief *Amicus Curiae* of the ABA at 14-24. Even apart from considerations of *stare decisis*, however, that demand should be rejected.

First, the actual *holding* in *Bowers*, that there is no fundamental liberty interest (or right) to engage in same-sex acts of sodomy, is fully consistent with this Court's precedents refusing to recognize (in a variety of contexts) a right of adults to engage in sexual conduct outside of marriage, and acknowledging the State's authority to proscribe such conduct. *See* Argument II(A), *supra*. Second, the analysis and methodology employed in *Bowers* for evaluating due process liberty claims are indistinguishable from those used by the Court in assessing other asserted liberty interests. The inter-

est must be described with precision.[12] And the interest, so described, may be regarded as "fundamental" *only* if it is firmly rooted in "the Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 710. *See also, id.* at 720-21; *Collins*, 503 U.S. at 125-27 & n.10; *Cruzan*, 497 U.S. at 278-79; *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). But, as demonstrated in *Bowers*, no interest in engaging in same-sex acts of sodomy can be derived from our

[12] *Washington v. Glucksberg*, 521 U.S. 702, 720-23 (1997) (characterizing asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing so," not whether there is "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," "[a] right to choose a humane, dignified death," or "[a] liberty to shape death") (citations and internal quotation marks omitted); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing alleged right as "the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution," not whether there is a right to "freedom from physical restraint," "a right to come and go at will," or "the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives"); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125-26 (1992) (describing asserted interest as a governmental employer's duty "to provide its employees with a safe working environment"); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278-79 (1990) (declining to decide whether there is a "right to die," but assuming that the Constitution granted competent persons "a constitutionally protected right to refuse lifesaving hydration and nutrition"); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (focusing on "historical traditions specifically relating to the rights of an adulterous natural father," rather than on whether "parenthood," "family relationships," "personal relationships," or "emotional attachments in general," are interests that have historically been recognized and protected) (plurality opinion) (citations and internal quotation marks omitted).

history and traditions. 478 U.S. at 192-94.[13]

Petitioners argue that contemporary legal (and social) acceptance of conduct traditionally and uniformly proscribed by the States undermines any basis for holding that such conduct may not be protected as a "fundamental liberty interest." Pet. at 20. "[T]he Court has always deemed it essential that the relevant legal tradition have continuing vitality today." *Id.* Petitioners reason that because barely one-fourth of the States retain criminal prohibitions of sodomy, the legal underpinnings of *Bowers* have been removed and the holding in *Bowers* collapses under the weight of current legal and social views of sodomy. Neither of the precedents petitioners cite supports this argument, however.

[13] Petitioners and their *amici* make much of the fact that the longstanding prohibition of sodomy identified in *Bowers* reached both homosexual *and* heterosexual acts. Pet. Br. at 21-22 & nn. 14-15; Brief of Professors of History as *Amici Curiae* at 3-10; Brief of *Amici Curiae* the ACLU and the ACLU of Texas at 12, 16-17 & nn. 13-14, 22-27; Brief *Amicus Curiae* of the ABA at 17-19 & n. 12. But they utterly fail to explain the relevance of this evidence to the issue at hand. Although the historical prohibition of sodomy may have included both homosexual and heterosexual acts, the fact remains that there was an unbroken and uniform condemnation of *homosexual* acts of sodomy in common and statutory law from colonial times until 1961, and that even as late as 1986, when *Bowers* was decided, such acts were criminal in almost one-half of the States. Significantly, *all* of the historical evidence marshaled by petitioners and their *amici* demonstrate that the conduct of which petitioners were convicted in this case--anal intercourse between two men--was *always* included in *any* definition of sodomy. Equally irrelevant is evidence that "as early as the post-Revolutionary period, states have very rarely applied laws banning sodomy . . . to consenting adults in private." Brief *Amici Curiae* of the ACLU and the ACLU of Texas at 13. Lack of enforcement could be attributed to any number of factors, including the difficulty of obtaining admissible evidence of the crime and finding witnesses willing to testify, as well as the allocation of scarce investigative and prosecutorial resources.

In *Washington v. Glucksberg*, the Court noted that the States' assisted-suicide bans had been reexamined in recent years and, with one exception, reaffirmed. 521 U.S. at 716. In concluding that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause," the Court said that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it." *Id.* at 728. Nevertheless, the Court neither stated nor implied that *only* a near uniform, contemporary rejection of the asserted liberty interest is an indispensable prerequisite to its denial. Moreover, *amicus* emphasizes that there were *two* questions to be answered in *Glucksberg*: Whether the liberty language of the Due Process Clause included "a right to commit suicide," and, if so, whether that "interest include[d] a right to assistance in doing so." *Id.* at 723. *Glucksberg* clearly and unequivocally rejected *both* a right to commit suicide *and* a right to assistance in committing suicide, and this despite evidence that suicide itself has not been a criminal offense in the United States since colonial times. *Id.* at 712-14.

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Scalia, joined by the Chief Justice, Justice O'Connor and Justice Kennedy, noted that the petitioner had failed to show any historical support for "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man." *Id.* at 125. Because it was petitioner's burden "to establish that such a power . . . is so deeply embedded within our traditions as to be a fundamental right," Justice Scalia commented that "the lack of evidence alone might defeat his case." *Id.* Nevertheless, he added that "the evidence shows that even in modern times . . . the ability of a person in [petitioner's] position to claim paternity has not been generally acknowledged." *Id.*

As *Michael H.* suggests and *Glucksberg* confirms, a longstanding tradition of rejecting an asserted "right" may suffice to deny its recognition as a protected liberty interest, even if the conduct has been largely (as in sodomy) or entirely (as in suicide) decriminalized. Thus, the fact that only thirteen States still prohibit sodomy, as opposed to the twenty-four States at the time *Bowers* was decided, does not change the constitutional calculus.[14] There is no fundamental liberty interest in engaging in acts of same-sex sodomy.[15]

States may be deterred from removing criminal penalties for certain types of conduct (*e.g.*, possession of marijuana) if they believe that decriminalization may turn out to be a one-way street, *i.e.*, if enough other States remove penalties for the same conduct, this Court may discover a new liberty interest in engaging in that conduct. States may decriminalize certain conduct without intending thereby either to create a constitutional right to engage in the formerly prohibited conduct, or to forever bar themselves from reinstating penalties if the experiment with decriminalization fails.

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[14] It should be noted that "the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens." *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting).

[15] Petitioners' attempt to import Eighth Amendment principles of interpretation into due process jurisprudence, *see* Pet. Br. at 24, citing *Atkins v. Virginia*, 536 U.S. 304 (2002), should be resisted. Resort to "evolving standards of decency" may be appropriate in interpreting the Eighth Amendment, *Trop v. Dulles*, 356 U.S. 86, 101 (1958), but that is because the text of the Amendment itself fairly contemplates reliance on such standards. The same cannot be said of the Due Process Clause. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992).

Finally, petitioners state that "[d]enying the existence of a liberty interest in private consensual adult sexual activity would give constitutional legitimacy to the grossest forms of intrusion into the homes of individuals and couples." Pet. Br. at 15. *See also* Brief of *Amici Curiae* Constitutional Law Professors at 24-27. Petitioners' suggestion that denial of their due process claim in this case would usher in a reign of "sexual fascism" cannot be reconciled with their admission that police and prosecutors have *never* pursued a policy of investigating and prosecuting strictly private, noncommercial sexual conduct between consenting adults. *Id.* at 21, 45. That such a policy was never pursued in the past, even after *Bowers* was decided more than sixteen years ago, should allay any concern that it would ever be pursued in the future.

III. THE POLICY CHOICE OF THE STATE OF TEXAS TO PROHIBIT SAME-SEX, BUT NOT OPPOSITE-SEX, ACTS OF SODOMY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners also attack § 21.06 on equal protection grounds. Pet. Br. at 32-50. Petitioners and their *amici* assert that the statute classifies persons on the basis of their sexual orientation, and that legislative classifications based on sexual orientation discriminate against homosexuals in violation of the Equal Protection Clause. Neither their premise nor their conclusion withstands scrutiny.

A. Section 21.06 Does Not Classify Persons.

Section 21.06 classifies *conduct*, not *persons*, much less persons of a particular sexual orientation. The statute applies to same-sex acts of sodomy regardless of one's sexual

orientation--homosexual, bisexual or heterosexual. No conviction under § 21.06 requires proof of the defendant's sexual orientation, and evidence of a defendant's heterosexual orientation would not constitute a defense. Thus, it cannot be said that the law "creates classes of persons." Pet. Br. at 9. *See also* Brief of the National Lesbian and Gay Law Ass'n, *et al.*, as *Amici Curiae*, at 5 (referring to "legislative actions that classify persons"); Amicus Brief of Human Rights Campaign, *et al.*, at 2 ((law "punish[es] and brand[s] as criminals a class of citizens defined by their emotional and physical attraction to members of the same sex as themselves"). For that reason, the myriad of cases petitioners and their *amici* cite regarding limitations on the authority of the States under the Equal Protection Clause to classify *persons* (or groups of persons) are inapplicable. Statutes that do not "draw any distinctions between persons," but "apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." *Vacco v. Quill*, 521 U.S. 793, 800 (1997), quoting *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979).[16]

Even assuming, however, that in prohibiting acts of same-sex sodomy, § 21.06 may be said to classify on the basis of sexual orientation (because only same-sex acts are prohibited), petitioners and their *amici* have not shown that such classification is unconstitutional. As a threshold matter, nothing in the record indicates the sexual orientation of petitioners themselves. If the classification the State is purporting to define is persons of a homosexual orientation, we do not know, on this record, whether petitioners even belong to the class. That alone is sufficient to reject their equal protection

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[16] That § 21.06 may affect primarily homosexuals is of no more constitutional significance than the fact that the veterans' preference upheld in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), primarily benefitted men.

challenge. Putting that standing question to one side, petitioners have not shown that classifications proscribing conduct on the basis of sexual orientation are unconstitutional.

B. Classifications Prohibiting Conduct On The Basis Of Sexual Orientation Are Not Subject To Heightened Scrutiny.

Petitioners assert that "[h]eightened scrutiny is appropriate for laws like Section 21.06 that use a sexual-orientation-based classification." Pet. Br. at 32 n.24. Nevertheless, they do not develop an argument that the Court should *adopt* such a standard of review and none of their *amici* ask the Court to do so, either. Petitioners' failure to ask the Court to adopt a heightened standard of review is not surprising because there is no law to support such a request.

This Court has never held that sexual orientation is a suspect (or even a quasi-suspect) basis for classification and has strongly implied that it is not. *See Romer v. Evans*, 517 U.S. 620, 628-29 (1996) (noting that in extending the protection of anti-discrimination statutes and ordinances to include sexual orientation, "Colorado's state and local governments have not limited anti-discrimination laws to groups that so far have been given the protection of heightened equal protection scrutiny under our cases"). With the exception of one panel decision of the Ninth Circuit Court of Appeals that was later withdrawn, *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990), no federal court of appeals has ever applied heightened scrutiny when considering equal protection claims in the context of sexual orientation. Nine of the thirteen federal courts of appeals have held that homosexuals do not constitute a suspect or a quasi-suspect class entitled to greater than rational basis scrutiny for equal

protection purposes,[17] and a tenth court of appeals has strongly intimated the same. *See Shahar v. Bowers*, 114 F.3d 1097, 1099 n.2 (11th Cir. 1997) (*en banc*) ("Given the culture and traditions of the Nation, considerable doubt exists that plaintiff [a woman] has a constitutionally protected federal right to be 'married' to another woman"), *cert. denied*, 522 U.S. 1049 (1998).

"Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes" because it is "primarily behavioral in nature." *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). *See also High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes"). Because it is "primarily behavioral in nature," homosexuality lacks common elements with those classifications which are based on immuta-

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[17] *See Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 948 (1996); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*), *cert. denied*, 478 U.S. 1022 (1986); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289, 292-93 & nn.1-2 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n.8 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Richenberg v. Perry*, 97 F.3d 256, 260 & n.5 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Holmes v. California National Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*), ; *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

ble, observable or legal characteristics, such as race, sex, alienage or illegitimacy. For that reason, it should not be treated as a suspect or quasi-suspect basis for classification.[18]

C. *Romer v. Evans*, 517 U.S. 620 (1996), Does Not Control The Disposition Of This Case.

In asking the Court to strike down the Texas sodomy statute on equal protection grounds, petitioners and their *amici* rely heavily upon *Romer v. Evans*, 517 U.S. 620 (1996), where the Court declared unconstitutional Amendment 2 to the Colorado Constitution.[19] Petitioners' reliance on *Romer* is misplaced and their effort to "shoehorn" the facts of this case into the framework of *Romer* fails.

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[18] Petitioners' comment in passing that § 21.06 "employs a gender-based classification," Pet. Br. at 32 n.34, and, therefore, should be subject to intermediate scrutiny, overlooks the fact that the statute affects men and women equally. Neither men nor women may engage in acts of sodomy with other members of the same sex. *See State v. Walsh*, 713 S.W.2d 508 (Mo. 1986). Section 21.06 no more discriminates on the basis of sex than do statutes barring members of the same sex from marrying each other. *See Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (upholding prohibition of same-sex marriage).

[19] "No protected status based on homosexual, lesbian or bisexual orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing." COLO. CONST. Art. II, § 30b (West 2001).

In the very first paragraph of the opinion in *Romer*, the Court said that the Equal Protection Clause endorses the principle that the law must be neutral "where the rights of persons are at stake." 517 U.S. at 623. Unlike *Romer*, however, where a variety of legal rights were affected by Amendment 2, including the ability to "change the law,"[20] there is no underlying right--constitutional or otherwise--affected by the Texas sodomy statute. *See* Argument II, *supra*; *Bowers v. Hardwick*, 478 U.S. 186 (1986). Moreover, as noted above, *see* Argument III(A), *supra*, § 21.06 classifies *conduct*, not *persons*. The state constitutional amendment struck down in *Romer* purported to reach beyond "homosexual, lesbian or bisexual . . . conduct, practices or relationships," to include "orientation," as well. Thus, in a constitutionally relevant sense, Amendment 2 discriminated on "the status of being a homosexual [lesbian or bisexual]," *Fuller v. Rich*, 925 F.Supp. 459, 462 (N.D. Tex. 1995), *aff'd in part without published opinion*, 91 F.3d 138 (5th Cir. 1996). Indeed, in the penultimate paragraph of its opinion in *Romer*, the Court described Amendment 2 as a "*status-based enactment* divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. at 635 (emphasis supplied).

"Amendment 2, confounds [the] normal process of judicial review" under the Equal Protection Clause:

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[20] *Id.* at 631 (noting that under Amendment 2, homosexuals "can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps . . . by trying to pass helpful laws of general applicability," irrespective of "how local or discrete the harm, no matter how public and widespread the injury").

> It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence

Id. at 633. Unlike Amendment 2, § 21.06 of the Texas Penal Code does not "identif[y] persons by a single trait," or "den[y] them protection across the board." It in no way purports to "disqualif[y] . . . a class of persons from the right to seek specific protection from the law."

> Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries, caused by discrimination, and it forbids reinstatement of those laws and policies.

Id. at 267. None of this can be said of § 21.06.[21] *Romer* does not dictate the outcome of this case.

D The Prohibition Of Same-Sex Acts Of Sodomy Is Rationally Related To One Or More Legitimate State Interests.

Where "a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate

[21] This case does not present the question as to whether statutes that discriminate *solely* upon one's sexual orientation, as opposed to one's conduct (however motivated), are constitutional.

end." *Romer v. Evans*, 517 U.S. at 632, citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Moreover, the legislature need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Instead, the classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Section 21.06 does not burden a fundamental right nor does it target a suspect class. The statute is rationally related to one or more legitimate state interests, including the State's belief that sexual acts between members of the same sex are immoral and should be discouraged. Such a belief does not betray Texas as benighted or bigoted any more than opposition to abortion indicates an animus against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-71 (1993). It is a belief that is consistent with a long tradition in English and American law, as this Court acknowledged in *Bowers*. Even without regard to other possible state interests (*e.g.*, promoting public health), that is sufficient to sustain its constitutionality under the Equal Protection Clause.

Petitioners ask the Court to hold that there is no rational basis for distinguishing same-sex acts of sodomy, which § 21.06 prohibits, from opposite-sex acts of sodomy, which it allows. But, "the two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996), quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946). Same-sex acts cannot be equated with opposite-sex acts. If it is "irrational" for the States to forbid same-sex, but not opposite-sex, sodomy, then it may be asked whether it is not also irrational for the States to allow opposite-sex couples, but not same-sex couples, to marry. Petitioners' answer is not in doubt.

In the final paragraph of their brief, petitioners, referring to *Boddie v. Connecticut*, 401 U.S. 371 (1971), assert that "the majority may not decide that the availability of divorce . . . is critical for the majority itself but then deny [that] benefit[] to a few, ..." Pet. Br. at 50. Substitute "marriage" for "divorce," and it becomes immediately apparent that petitioners intend to use a favorable holding in this case as a judicial battering ram to break down the statutory barriers to same-sex marriage. Petitioners have not shown that they are entitled to such a holding. Accordingly, the judgment of the Texas Court of Appeals should be affirmed.

CONCLUSION

For foregoing reasons, *amicus curiae*, United Families International, respectfully requests that this Honorable Court affirm the judgment of the Texas Court of Appeals.

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

vs.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas, Fourteenth District

BRIEF OF AMICI CURIAE CENTER FOR ARIZONA POLICY AND PRO-FAMILY NETWORK IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Whether the evidence presented in this case is sufficient to justify the Court's invalidation of a public policy determination of the Texas Legislature as violative of either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE

The Center for Arizona Policy is a nonprofit organization working to strengthen policy regarding marriage and the family in the state of Arizona.[1] CAP and its supporters strongly believe children deserve a home with a mother and a father. CAP President Len Munsil drafted Arizona's law banning same sex marriage, and CAP has actively lobbied against extending special workplace job protections based on sexual behavior.

Pro-Family Network (PFN) is a non-profit organization committed to protecting the family and traditional moral values. PFN represents pro-family values in state legislatures, executive agencies, Congress, and before other government bodies and officials, and serves to inform citizens on matters important to the family, morality, and legislation. PFN's founder and director, Greg Quinlan is a registered nurse with professional experience caring for AIDS patients. Mr. Quinlan is also personally interested in this case because he was introduced to sexual activity at the age of 10 by a same-gender neighbor and struggled with same-se x attraction until his late 20s. During that time, Mr. Quinlan was also involved in the homosexual lifestyle and gay activism. Concurrent with an introduction to religious faith, Mr. Quinlan left the homosexual lifestyle and gay activism.

Amici are concerned that this Court not rely on incomplete information provided by Amici American

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[1] No counsel for a party authored any part of this brief. No person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Psychological Association et al. in determining this important matter of law regarding sexual conduct.

SUMMARY OF ARGUMENT

Petitioners' challenge to Texas Penal Code § 21.06, a law prohibiting "deviate sexual conduct" between persons of the same sex, raises numerous issues of social, moral, legal and scientific importance. Petitioners and their Amici seek this Court's intervention in the midst of a longstanding and contentious public debate over societal and sexual mores and the proper role of government. Before inserting itself into this controversy, however, the Court should be fully aware that it is also inserting itself into the midst of a developing field of scientific research, and should exercise great caution to avoid any decision which may ultimately prove to be on the wrong side of science.

In its amici curiae brief to this Court, the American Psychological Association, et al. (hereinafter, "APA Amici"), argued, *inter alia*, that homosexuality is a "normal form of human sexuality," that homosexuality has no inherent association with psychopathological conditions, and that same-sex unions are largely similar to heterosexual marriages. At best, these claims are controversial, and in some cases the APA Amici's arguments are misleading or simply false.

This brief will bring to the Court's attention data which clarifies or contradicts a number of assertions presented in the APA Amici brief. The APA Amici's own experts elsewhere contradict the APA's assertions that homosexuality bears no connection to psychopathological condition, and undermine the confidence with which the APA Amici assert that any such correlation is simply the result of societal prejudice. In addition, several key studies

relied upon by the APA Amici are either methodologically flawed or have been contradicted by more recent research. To the extent that such data is relevant to the Courts' consideration of this case, it is important that the Court be presented with an accurate and comprehensive look at the available scientific research.

ARGUMENT

I. THIS COURT SHOULD DEFER TO THE WISDOM OF THE TEXAS LEGISLATURE RATHER THAN INSERT ITSELF INTO AN ONGOING SCIENTIFIC DEBATE.

No decision of this Court may legitimately be based on the research presented by the APA Amici in their brief.[2] While purportedly based on psychological and psychiatric research, the APA Amici's brief misconstrues and selectively applies several important studies. In addition, authors of the APA brief have overlooked more recent studies which contradict some of the earlier conclusions cited in the brief. While contributions from the psychological research community are valuable to this Court's understanding of the nature of homosexuality and same-sex sexual activity, such data must be presented in a neutral and comprehensive manner. Unfortunately, the APA Amici fail to do so.

Nonetheless, the issues raised by APA Amici are important questions to be brought to the attention of this

[2] Amici APA bring a large body of scientific evidence to the Court's attention for the first time on appeal. As will be discussed below, much of this data is controversial and not appropriate for the judicial notice of the Court. To the extent that Amici APA have introduced new evidence on appeal, such research is not properly before the Court. Once the new evidence is stripped away, the APA's brief contains little information of value to the Court and should be disqualified under Supreme Court Rule 37.1.

Court, highlighting the manner in which scientific research intersects with public policy. This Court appropriately exercises great caution when asked to take sides in an ongoing public policy debate. *Schall v. Martin*, 467 U.S. 253, 281 (1984) ("[I]t is worth recalling that we are neither a legislature charged with formulating public policy nor the American Bar Association committee charged with drafting a model statute."); *Reno v. Flores*, 507 U.S. 292, 315 (1993).

Much of the research relied upon by Amici APA is methodologically flawed, inconclusive, or conflicts with subsequent research in the area of homosexuality. Until the research surrounding homosexuality is developed to the point where it produces reliable and consistent outcomes, this Court cannot rely on it as a sufficient basis to warrant intervention in the public policy decisions of the Texas Legislature. Rather, this Court should defer to the legislative wisdom of Texas elected officials, leaving questions of public policy in the legislative arena where policy can be easily amended in response to additional research.

II. PETITIONER'S AMICI AMERICAN PSYCHOLOGICAL ASSOCIATION, ET AL., RELY ON RESEARCH WHICH IS SELECTIVELY CITED, CONTROVERTED BY THEIR OWN EXPERTS' RESEARCH, INCONCLUSIVE OR FLATLY IN ERROR

In its amici curiae brief to this Court, the American Psychological Association, et al., argued, *inter alia*, that homosexuality is a "normal form of human sexuality," that homosexuality has no inherent association with psychopathological conditions, and that same-sex unions are largely similar to heterosexual marriages. At best, these claims are controversial, and in some cases Amici APA's arguments are misleading or simply false.

An objective review of the APA brief suggests that it is driven more by political motivation than by scientific data. In their brief, Amici APA repeatedly rely on studies which have been subsequently refuted or questioned, and ignore studies which do not support their desired outcome in this case. Notable among these are studies of homosexuality as it relates to psychopathology, and even the works of some contributing to the APA's brief.

Perhaps most remarkable among the studies relied upon by the Amici APA is the work of Charlotte Patterson, who is acknowledged as a contributor to the APA brief and who also wrote several of the studies relied on by the Amici APA. APA Br. at 1, n.2, and 20. In 1997, a Florida Court was forced to exclude her studies from evidence in the case, concerned about her impartiality as a researcher. In that case, Patterson was sanctioned by the court for refusing to turn over any data supporting her gay parenting studies, even to the attorneys who hired her as an expert witness. *Amer v. Johnson*, 4 Fla.L.Wkly.Supp. 854b (Fla. 17th Cir. 1997).

Peer reviews of Dr. Patterson's studies have revealed fundamental flaws, including the presentation of small, self-selected samples as quantitative research. According to Robert Lerner, Ph.D. and Althea Nagai, Ph.D., these studies are "deeply flawed," primarily because of the fact that "when either or both the study and comparison groups know the purpose of the study and have a large stake in the substantive outcome, one almost inevitably introduces very serious sample selection biases into a study. The participants have every incentive to paint themselves in the best possible

light." [3] In addition, Dr. Patterson's studies have relied on small samples groups, in one case as few as 35 participants.[4]

Evelyn Hooker's study, *The Adjustment of the Overt Male Homosexual*, upon which Amici APA heavily rely to assert that homosexuality is not a psychopathology also contains serious and numerous methodological defects, both in motivation for the study by Hooker and the study participants and in mathematical miscalculations.

Hooker's study group was not random, but made up of volunteers from the gay rights group Mattachine Society which her report notes "has as its stated purpose the development of a homosexual ethic."[5] This alone is sufficient to deprive the study of any statistical validity. In addition, individuals who proved unstable were later deleted from the final sample.[6]

In addition, Hooker's research required administration of the Rorschach test (a complicated test with which she had no prior administration experience), the Thematic Apperception Test (TAT) in which the subjects make up stories about pictures of people in various settings, and the Make-A-Picture-Story (MAPS) Test in which subjects arrange cut-out pictures and then make up a story about their arrangement.

The homosexual subjects engaged in (homo)sexual fantasies during the TAT and MAPS tests, thereby exhibiting a highly significant statistical association between

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[3] Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* at 69, 74 (2001). *See also* Judith Stacey and Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 Am. Sociological Rev. 159 (2001).

[4] Lerner, *id.*, at 103.

[5] E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 Journal of Projective Techniques 17, 19 (1957).

[6] Thomas Landess, *The Evelyn Hooker Study and the Normalization of Homosexuality*, 5 NARTH Bulletin 8 (Dec. 1997)(emphasis added).

homosexuality and obsessive sexual fantasy (a standard category for diagnosing psychopathology using Rohrshach and similar "projective tests." The heterosexual subjects showed no such disproportionate evidence. Because the identity of the homosexual subjects was so obvious from these tests, Hooker changed her study midstream and removed from TAT and MAPS tests from the judges' review. This alteration of her study alone is sufficient to automatically invalidate its results; unaltered, the study confirms precisely the opposite of what she claims. Note that from a point of view that is agnostic with respect to the "normalcy" of homosexuality per se, the critical finding excluded by Hooker is the qualitative *form* of the fantasy life exhibited by the homosexual subjects (i.e., obsessive), not the homosexual *content.* E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 Journal of Projective Techniques 17, 19 (1957).

Finally, Hooker concluded her report with a "*highly selective summary* of comments by judges, all of which support her thesis that the two groups are, in effect, indistinguishable in terms of 'overall adjustment.'"[7]

Even having chosen to use Hooker's research, the Amici APA do so selectively, ignoring the fact that Hooker finds data to suggest that homosexuality is a pathology, even if limited to the realm of sexuality.[8] Such could be the case, but for the fact that the homosexuals studied were unable to control their homosexual fantasies even in "non-erotic situations" as the MAPS and TAT tests.

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[7] *Id.*

[8] Hooker, *supra.*, at 30 (noting that the pathology of homosexual may only occur "in an erotic situation, and that the homosexual can function well in non-erotic situations such as the Rorschach, TAT, and MAPS. Thus, one could defend the hypothesis that homosexuality is symptomatic of pathology, but that the pathology is confined to one sector of behavior, namely, the sexual."

Hooker also notes in her study that "the life history data from the two groups will differ: namely, in the love relationships. Comparisons between the number and duration of love relationships, cruising patterns, and degree of satisfaction with sexual pattern and the love partner will certainly show clear-cut differences."[9] While Hooker has never published these life histories recorded at the time of the study, they likely comport with subsequent data from other researchers revealing a greater number of sexual partners among homosexuals than heterosexuals,[10] and a significantly shorter duration in relationships.[11]

III. AMICI APA FAIL TO ACKNOWLEDGE, YET OWN EXPERTS CONFIRM, THAT THERE IS GREAT VARIABILITY IN HOMOSEXUALITY OVER THE LIFESPAN OF AN INDIVIDUAL, MORE FREQUENTLY DISAPPEARS SPONTANEOUSLY THAN NOT, AND IS SIGNIFICANTLY CHANGEABLE OTHERWISE

The Amici APA brief states that homosexual orientation is "highly resistant to change" (APA Br. at 4), but fails to

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[9] *Id.*

[10] See, e.g., Laumann et al., *The Social Organization of Sexuality* 315 (1994). (Relied upon for other purposes in the APA brief, this source shows that the mean lifetime (after age 18) number of sexual partners for male homosexuals/bisexuals was 35.9, compared to 16.6 partners of heterosexual males, and 19.8 for homosexual/bisexual females, compared to 5.1 for heterosexual females.).

[11] L.A. Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality* 321, 335 *in Homosexuality/Heterosexuality: Concepts of Sexual Orientation* (1990) (only study cited for "the longevity of relationships" covered a total period of 18 months); Marcel T. Saghir, M.D. & Eli Robins, M.D., *Male and Female Homosexuality: A Comprehensive Investigation* 57, Table 4.13; 225, Table 12.10 (1973) (15% of homosexual men and 17.3% of homosexual women surveyed had relationships lasting more than 3 years; only 4 out of 252 men and 1 out of 138 women stayed together more than 10 years).

acknowledge that many have successfully changed from a homosexual to heterosexual orientation, or that thi. has increased their levels of happiness[12] and removed them from a high medical risk behavior group.[13]

Amici APA define "homosexual orientation" as "enduring, and then state that homosexual orientation is "highly resistant to change." While as a tautology this can only be true, they fail to report that many individuals—indeed, if their own cited expert is to be credited, nearly half (at a minimum)—of those who (once) belonged to the "group" amici purport to represent spontaneously changed from a homosexual to heterosexual "orientation,"; that many studies show a significant rate of psychotherapeutic exit from homosexuality and that this change, whether spontaneous or deliberate, is associated with significantly higher levels of happiness, lower levels of sexual dysfunction, lower levels of psychopathology and removed them from behavior group at extremely elevated risk for

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[12] Laumann et al. at 362 ("[H]omosexual men and women report themselves to be unhappy . . . ."). Laumann's "Levels of Happiness, by Sexual Behaviors" data, Table 10.4 reveals those reporting male and female homosexuality, as well as participation in oral or anal sex in the last sexual event showed statistically lower levels of happiness, whereas individuals who had one sexual partner in the last year, were male or female heterosexuals, and had not engaged in oral or anal sex in their last sexual event scored statistically higher levels of happiness. *Id.*

[13] *See, e.g.*, Laumann at 396 ("[A]nal intercourse is known to have a higher rate of infectivity of HIV than oral or vaginal intercourse."); Christy Feig, "Experts Fear HIV Rates Increasing in U.S.," CNN.com, Feb. 12, 2003, available at http://www.cnn.com/2003/HEALTH/conditions/02/12/hiv.rates/index.html (last visited Feb. 13, 2003) ("Sabina Hirshfield, director of the Medical and Health Research Association of New York City, said another factor [in the 2001 14% rise in HIV diagnosis among men who have sex with men] might be tied to the use of the Internet to meet potential sex partners. Her clinic's survey of almost 3,000 gay men who said they frequent chat rooms found that 84 percent claimed they meet sex partners online and almost two-thirds admitted to unprotected sex.").

numerous severe and often life-threatening medical conditions in addition to that posed by HIV/AIDS: again, as repeatedly documented in studies conducted by amici's own contributors and experts as well as innumerable others. *See generally,* Laumann et al., *The Social Organization of Sexuality* and R. T. Michael et al. *Sex in America: A Definitive Survey* (1994).

E.O. Laumann's data, compiled in *The Social Organization of Sexuality*, and cited to by the APA "represent[s] the most varied and comprehensive measures of different aspects of homosexuality to be collected on a representative sample of U.S. adults."[14] Chapter 8 of Laumann et al. provides their extensive data and detailed analyses of homosexuality, homosexual behaviors and both prior and later psychological states associated with both. The Amici APA brief claims, "The exact proportion of heterosexuals, homosexuals and bisexuals in the United States are not known." APA Br. at 5. And claim that "different surveys have reached different estimates." They approvingly reference the research of Laumann et al. as "representative," offer a single statistic from within the data in Laumann pages 294-297, and otherwise avoid presenting the essence of his findings. In this section, Laumann et al present their data on the prevalence of homosexuality and the *congruence of theirs and all other validated such studies*. They discuss at length the fact *that the prevalence of men who have sex with men is not enduring but declines drastically with maturity*. In considering amici's argument as to the persistence of the trait that characterizes their claimed constituency, and the centrality of suspect class status to the legal debates surrounding homosexuality, it would be well worth the Court's time to read this material and come to their own conclusions as to what it demonstrates. Laumann's own explanation of why "The exact proportion of heterosexuals,

[14] Laumann et al., at 320.

homosexuals and bisexuals in the United States are not known" differs strikingly from the APA's: "...[E]stimating a *single* number for the prevalence of homosexuality is a futile exercise because it presupposes assumptions that are patently false: that homosexuality is a uniforn attribute across individuals, that it is stable over time, and that it can be easily measured."[15]

Not only have homosexuals been shown to spontaneously transfer out of a homosexual orientation, individuals have also changed their sexual orientation from homosexual to heterosexual. In his 2001 study, Dr. Robert Spitzer[16] revealed that 60-64% of study subjects experienced "good heterosexual functioning," even among those who were exclusively homosexual.[17]

Another important benefit reaped from this change effort is that study participants experienced a significantly marked decrease in depression between the time they were predominantly homosexual and the time they were experiencing good heterosexual functioning. In the year prior to their sexual orientation change effort, 43% of men and 47% of women experienced depression. After having

[15] Laumann et al., p 283

[16] Chair of the APA's Committee on Nomenclature in 1973 who spearheaded removal of homosexuality from DSM classification. With assistance from Dr. Richard C. Friedman, Dr. Spitzer later challenged his own views with a study of 204 subjects who had achieved "a change from homosexual to heterosexual attraction that has lasted at least five years." Dr. Robert L. Spitzer, *200 Subjects Who Claim to Have Changed Their Sexual Orientation From Homosexual to Heterosexual*, Presentation to Annual Meeting of the American Psychiatric Association, May 9, 2001.

[17] "Good heterosexual functioning" meant subjects were in a loving heterosexual relationship through the year prior to interview with emotional satisfaction of 7 on 1-10 scale, have heterosexual sex at least once a month, physical satisfaction from partner at 7 on 1-10 scale, and never or rarely have same-sex thoughts while having sex with the heterosexual partner. Spitzer, *id.*

changed their sexual orientation, only 1% of men and 4% of women were experiencing depression.[18]

The Amici APA brief criticizes studies showing individuals' successful sexual orientation change from homosexual to heterosexual for being based on self-reports of study participants. However, the APA's own cited resources rely heavily on self-reports for their findings. APA Br. at 23 (self-reports of homosexuals experiencing verbal harassment and violence because of sexual orientation.) If, as noted by the Amici APA, anti-gay harassment and violence are underreported by homosexuals, it is just as likely that changes in sexual orientation are undereported because of the American Psychiatric Association's unwillingness to validate their experiences.

In his presentation at an American Psychological Association symposium on August 7, 2000, Amici's own expert, Douglas C. Haldeman, Ph.D., stated:

"There appear to be many dissatisfied homosexually-oriented individuals who seek...change...particularly those who have have experienced less invasive styles of of conversion therapy seem not to have been affected adversely...do we have the right to deny such an individual treatment that may help him adapt in the way he has decided is right for him? I would say not."[19]

The success of this change effort, and its benefit to those who have and are seeking to change their sexual orientation, should not be ignored by the APA or by this Court.

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[18] *Id.*

[19] "APA Symposium Seeks Common Ground," report by Martin B. Koretzky, Ph.D., accessible at http://www.narth.docs/commonground.html (hard copy provided upon request).

IV. THE APA'S DECISION TO DECLASSIFY HOMOSEXUALITY AS A DISORDER WAS NOT BASED UPON SCIENTIFIC RESEARCH

The Amici APA brief implies that the decision to remove homosexuality from the Diagnostic and Statistical Manual ("DSM") was based on scientific research. However, it has been well documented that the decision was largely, if not primarily, a political decision as a result of pressure from homosexual activists. Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 189 (1987) ("That the American Psychiatric Association responded to the concerted pressure of an angry, militant movement that had made full use of coercive and intimidating tactics is undeniable"); Jeffrey B. Satinover, *Homosexuality and the Politics of Truth* 31-35 (1996); Charles W. Socarides, M.D., *Homosexuality: A Freedom too Far* 157-82 (1995). Even writers sympathetic to the homosexual movement have acknowledged the influence of activists on the decision. *See* R.C. Friedman, M.D., *Contemporary Psychoanalysis and Homosexuality*, 98 Experimental and Clinical Endocrinology No. 2, 155-60 (1991) ("The decision by the American Psychiatric Association to drop homosexuality as a diagnostic category from the DSM occurred in a context in which Gay Activism made its influence felt"). In fact, the Amici APA cite only one pre-1973 study that supposedly provided a scientific basis for declassifying homosexuality as a disorder. E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 Journal of Projective Techniques 17, 19 (1957). Even in citing the Evelyn Hooker study, the Amici APA ignore the fact that the study was not scientific, and yet still found evidence suggesting that homosexuality is a pathology, at least in the limited arena of human sexuality. *See* Thomas Landess, *supra*. Hooker, *supra.*, at 30.

Although the initial recommendation to remove homosexuality from the DSM purportedly came from the

Nomenclature Committee, it was never approved by that committee, but was only the recommendation of one member, Dr. Robert Spitzer. Bayer, *id.*, at 131. Indeed, the Nomenclature Committee, which had no experts on homosexuality among its members, was heavily divided because it felt that the change would be *good socially*, but that it was *not supported scientifically*. *Id.* at 129-30. Nevertheless, Spitzer's recommendation was submitted to the APA Council on Research and Development, which approved it despite knowing that the Nomenclature Committee had not done so. *Id.* at 133. The APA board of trustees' approval of removing homosexuality from the DSM resulted in an outcry from members who felt that the decision was not based on science. *Id.* at 139-42. As a result of the opposition, the APA leadership agreed to have a referendum on the decision. *Id.* at 143. In response, the National Gay Task Force ("NGTF") orchestrated the writing and signing of a letter from the APA leadership in support of the decision to every member. The NGTF also "purchased the necessary address labels from the [APA], and underwrote the full cost of the mailing." *Id.* at 145.

> Though the NGTF played a central role in this effort, a decision was made not to indicate on the letter that it was written, at least in part, by the Gay Task Force, nor to reveal that its distribution was funded by contributions the Task Force had raised. Indeed, the letter gave every indication of having been conceived and mailed by those who signed it. . . . Though each publicly denied any role in the dissimulation, at least one signer had warned privately that to acknowledge the organizational role of the gay community would have been the "kiss of death."

Id. at 146 (citation omitted).

With only a little over 10,000 members responding to the referendum, 37 percent opposed the change. *Id.* at 148. "The result was not a conclusion based on an approximation of the scientific truth as dictated by reason, but was instead an action demanded by the ideological temper of the times." *Id.* at 3-4. Despite the APA decision, a survey four years later found that 69 percent of psychiatrists still believed that "homosexuality is usually a pathological adaptation, as opposed to a normal variation." Socarides, *supra*, at 179; *see also* Satinover, *Homosexuality and the Politics of Truth* 35 (1996).

V. LESBIANS AND GAY MEN DO NOT FORM FAMILY UNITS SIMILAR TO HETEROSEXUALS

The APA Amici portray homosexual couples as in no essential way different from heterosexual couples in the types of relationships they form, the level of "commitment" they have, the character of emotional intimacy between them, and in their parenting outcomes. It should be noted by this Court that research from the APA's own experts, inter alia, reveals that lesbians and gay men do not characteristically form social units comparable to the family and sexual relationships of heterosexuals.

A. Partner Commitment Levels and Behavior

APA Amici refer to "committed relationships" based on same-sex sexual activity, but nowhere discuss or report on whether such relationships are monogamous, nor do they relate how long these relationships last. APA Br. at 18.

The most common same-sex relationship configuration, particularly those of gay men, is that of an "open relationship." F.C. Hickson, et al., *Maintenance of Open Gay Relationships: Some Strategies for Protection Against HIV*, 4

AIDS Care 409 (1992).[20] In fact, the longer a couple is together, *i.e.*, "committed," the more non-exclusive their relationship usually is. *Id.* "The higher mean numbers of partners for respondents reporting same-gender sex corresponds to a stereotype of male homosexuals that is widespread in our society." Laumann et al., *supra* at 316.[21]

As compared to heterosexuals, "[t]he expectation for outside sexual activity was the rule for male couples and the exception for heterosexuals." D. McWhirter and A. Mattison, *The Male Couple: How Relationships Develop* (Englewood Cliffs, N.J.: Prentice-Hall, 1984), p. 3.[22]

One survey of homosexual men in relationships reported that 65 percent had sex outside the relationship within the first year, with approximately 90 percent of the men in relationships lasting over five years being "nonexclusive." Joseph Harry, *Gay Couples* 115 & Table 6.1 (1984). A study of married heterosexual couples, however, revealed that 94%

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[20] Of 387 men interviewed, 65.1% had one or more regular sexual partner, 43.7% of those in relationships were deemed monogamous relationships, but 56.3% were deemed open relationships. Hickson, et al., *id.* APA's own sources and authors have conducted research consistent with the finding that the most common relationship configuration for homosexual men is that of one regular sexual partner plus other partners. *See, e.g.*, Blasband, D., & Peplau, L. A., *Sexual Exclusivity Versus Openness in Gay Male Couples*. 14 Archives of Sexual Behavior 395-412 (1985); Peplau, L. A., & Cochran, S. D., *Value Orientations in the Intimate Relationships of Gay Men*, 6 Journal of Homosexuality 1-9 (1981).

[21] Homosexual men had 16.9 partners in the last 5 years as compared to 4.9 partners of heterosexual men. Laumann et al. also notes that stereotype of lesbians having "lower rates at which new partners are required" does not fit the pattern revealed in the research.

[22] On average, homosexuals have 50 lifetime partners, compared to 4 lifetime partners among heterosexuals. Less than 2% of homosexuals are monogamous, while 83% of heterosexual couples are. Data compiled from Laumann et al., *The Social Organization of Sexuality* and R. T. Michael et al. *Sex in America: A Definitive Survey* (1994).

had one partner in the past year, heterosexual couples who were cohabiting were almost as faithful, and 75% of people who had never married but were living together had one partner in the past year. Robert T. Michael, et al., *Sex in America: A Definitive Survey* 101 (1994).

APA Amici cite R.A. Mackey et al. to assert that heterosexual and homosexual relationships "strongly resemble" each other in "many respects." APA Br. at 18. Mackey et al. notes that their study used logistic regression as a "useful took in this exploratory research, where the goal was to develop theory rather than test it." R.A. Mackey et al., *Psychological Intimacy in the Lasting Relationships of Heterosexual and Same-Gender Couples*, 42 Sex Roles 201-227, 213 (2000). They note further that "the goal was not to test theory but to develop an understanding of a subject . . . the sample fit the goal of this exploratory study." Mackey et al., id., at 223. The chosen sample specifically excluded couples that were together less than 15 years and did not indicate the percent of homosexual versus heterosexual couples which had to be excluded in order to achieve a comparable sample between the two couple types. This provides a very narrow, non-representative subset of the general homosexual population to compare to a more representative sample of the heterosexual population.

Cochran, one of the contributors to the APA Amici brief, has herself stated in a study that "Little empirical work is currently available on commitment and permanence in homosexual relationships." L.A. Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality* 321, 335 in *Homosexuality/Heterosexuality: Concepts of Sexual Orientation* (1990).

The APA's brief cites to Laumann et al. to support their statement that the sexual practices prohibited by the Texas law "are important aspects of sexual intimacy for many

American heterosexual couples." APA Br. at 21. However, Laumann's study specifically reveals that oral sex is "a technique with which most people have at least some familiarity, but it has in no sense become a defining feature of sex between women and men (as vaginal intercourse or, perhaps, kissing is) . . . it is important to establish at the outset the ambiguity of oral sex in the repertoire of [heterosexual] techniques." Laumann et al., *supra*, at 101.

Laumann's research also reveals that heterosexuals engage in anal sex even less than oral sex: "anal sex has not entered into the repertoire of regular sexual practices of most women and men in the United States." Laumann, *supra*, at 107. This study found that only one-quarter of men and one-fifth of women have experienced anal sex over a lifetime, and is far less frequent than that in any given year of life. *Id.* Heterosexuals were also 79% less likely to find anal intercourse as "very appealing" compared to vaginal intercourse. Laumann et al., *supra*, at 152-155, Table 4.2.

Because oral and anal sex are primary means of sexual activity between individuals of the same sex (APA Br. at 22-23), and such is not the case with heterosexual couples, it should be considered that the Texas law has reasonably and narrowly drawn their prohibition of "deviate sexual intercourse" to those couples where it is most likely to take place. The Texas law may also contemplate the higher rates of sexually transmitted diseases which are related to certain sexual behaviors, and seeks to prohibit behavior associated with a higher prevalence of sexually transmitted infections (not only HIV/AIDS) and sexually associated infections and other illnesses. Laumann et al., *supra*, at 396.

It is well-documented that as the number of sexual partners rise, the likelihood of having a partner with a sexually transmitted infection also rises. Laumann et al., *supra*, at 403; *see generally* Hickson et al., *supra*. As has

been noted, homosexuals have a much greater number of sexual partners,[23] as compared to heterosexuals, and engage in sexually riskier activity,[24] therefore, there are serious health considerations implicated in same-sex sexual activity which should be taken into account when a legislature proscribes certain sexual activities.

B. Obligatory Fatherlessness and Motherlessness

Attempting to create a legal and factual connection between Texas Penal Code § 21.06 and same-sex parenting data, the APA Amici allege that "suppressing sexual intimacy among same-sex partners would deprive gay men and lesbians of the opportunity to participate in fundamental aspects of human experience," including the opportunity to raise children in a family setting. APA Br. at 15, 19. Once again, however, APA Amici attempt to prove too much. In an effort to demonstrate that large numbers of same-sex couples are raising children, the APA claims that "the children of lesbian and gay parents in the United States today *almost certainly* number in the millions." At the same time, however, they acknowledge that there are "no data" to indicate the number of same-sex couples raising children in the United States. APA Br. at 19. Moreover, in suggesting that hundreds of thousands of gay and lesbian parents are

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[23] "[Gay male relationship] rules emphasize that other sexual relationships are different; that they are 'only sex' . . . 'We must not go back to someone twice; that would be a relationship,' 'We're not allowed to have partners we see more than once.'" Hickson et al., *supra*, at 415.

[24] "For HIV/AIDS in particular, anal intercourse is known to be especially dangerous because it is an efficient way of transmitting HIV." Laumann at 416; "Survey and clinical trials data indicate that condom breakage and slippage rates vary during anal intercourse and may be considerably higher than during vaginal intercourse," Silverman, et al., *Use and Effectiveness of Condoms During Anal Intercourse*, 24 Sexually Transmitted Diseases No. 1 Jan. 1997.

currently raising children in the United States,[25] APA Amici implicitly rebut their own premise that section 21.06 deprives gay men and lesbians of the opportunity to raise children.

The APA also succumbs to the temptation of overstating the available research on same-sex parenting, suggesting that a cumulative body of faulty research gains credibility by virtue of sheer volume. Over the past two years, even researchers who are generally supportive of same-sex parenting have been forced to conclude that (a) there is no reliable body of scientific data addressing the question of same-sex parenting, and (b) what evidence exists tends to show certain differences between children raised by gay and lesbian parents and children raised by a married heterosexual couple.

In 2001, Professors Judith Stacey and Timothy Biblarz reviewed 21 studies from the body of research purporting to examine homosexual parenting. Judith Stacey and Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 Am. Sociological Rev. 159 (2001); *See also* Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 Developmental Psychology 130, 133-134 (1995). Despite their personal endorsement of parenting by same-sex couples, Stacey and Biblarz found serious problems with both the methodology and the conclusions of the studies they reviewed. *Stacey, supra* at 174. Notably, the authors acknowledge "there are no

[25] Data from the 2000 Census shows 601,209 same-sex couples in the United States, roughly 7% (42,912) of whom live in the state of Texas even in spite of section 21.06. Table PCT1: Unmarried-partners households by sex of partners, 2000 United States Census, available at www.census.gov (last visited Feb. 13, 2003) . While not all gay and lesbian parents live in same-sex partnerships, this proportion of same-sex couples living in Texas suggests that APA may overstate the impact of the Texas statute.

studies of child development based on random, representative samples of [same-sex couple headed] families." *Id.* at 166. Robert Lerner and Althea Nagai earlier reached a similar conclusion after reviewing 49 of the studies comprising the body of gay parenting research. Due to the deeply flawed methodologies prevalent in every study, Lerner and Nagai were forced to conclude "that the methods used in these studies are so flawed that the studies prove nothing." Lerner and Nagai, *supra*, at 6. Common problems with the studies included: (1) failure to use a testable hypothesis or attempt to prove a negative hypothesis (*id.* at 13-16); (2) lack of control methods, such as failure to control for group variables like income and education, or even the complete failure to use any comparison group (*id.* at 27); (3) no references to the measures used to establish the validity of the studies (*id.* at 66); (4) absence of representative samples including self-selected sample groups (*id.* at 75-77); (5) Failure to show that the results are not a function of chance factors.

Among the methodological flaws in the same-sex parenting research is a tendency of researchers to ignore their own data suggesting a number of differential outcomes for children of homosexual parents, including an increased likelihood of the child's developing a homosexual sexual orientation. Stacey and Biblarz, *id.*, (2001).

The surprising part about ignoring such differences, particularly as to the sexual orientation of children of homosexual parents, is that they would be predicted by the major theories of the psychology of child development. As Baumrind stated in questioning the work of Charlotte Patterson, for example, "[t]heoretically, one might expect children to identify with lifestyle features of their gay and lesbian parents." Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 Developmental Psychology 130, 134 (1995). As well, one

"might also expect gay and lesbian parents to be supportive . . . of their child's nonnormative sexual orientation." *Id.* As a result, Baumrind said, "[i]t would be surprising indeed . . . if children's own sexual identities were unaffected by the sexual identities of their parents." *Id.*

The existence of such differences is not just theoretically predicted, but also reflected in actual study results. As Stacey and Biblarz wrote in their study:

> A significantly greater proportion of young adult children raised by lesbian than heterosexual mothers in the Tasker and Golombok sample reported having had a homoerotic relationship (6 of the 25 young adults raised by lesbian mothers–24% compared with 0 of the 20 raised by heterosexual mothers). . . .
>
> Relative to their counterparts with heterosexual parents, the adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste. . . .
>
> [P]arental sexual orientation is positively associated with the possibility that children will attain a similar orientation, and theory and common sense also support such a view. Children raised by lesbian co-parents should and do seem to grow up more open to homoerotic relationships.

Stacey and Biblarz, *supra*, at 170.

Finally, while the causal mechanisms are disputed, the APA Amici brief does concede that homosexual sexual behavior correlates with increased rates of depression, substance abuse, sexually transmitted diseases and even suicidal ideation. APA Br. at 26. Given this unfortunate correlation, many remain skeptical that families headed by same-sex couples are a place in which children should be raised.

VI. THERE IS NO CAUSAL CONNECTION BETWEEN DISAPPROVAL FOR SAME-SEX SEXUAL ACTIVITY AND PSYCHOPATHOLOGIES RELATED TO HOMOSEXUALITY

While empirical research has found strong correlations between homosexuality and psychopathology, APA Amici *both* disclaim the existence of such an association, and without evidence attribute its existence to societal disapproval of homosexuality. APA Br. at 12, 26.

First, APA Amici claim that "[r]esearch has found no inherent association between homosexuality and psychopathology." APA Br. at 2. This is simply false. While research has not conclusively discovered the causes of homosexuality and other psychopathologies, even experts relied upon by APA Amici concede that homosexuality and various psychopathological conditions are strongly correlated. S.E. Gilman, et al, Risk of Psychiatric Disorders Among Individuals Reporting Same-Sex Sexual Partners in the National Comorbidity Survey, 91 Amer. J. Pub. Health 933-39 (2001) (Using data from a nationally representative household survey, researchers found that "homosexual orientation, defined as having same-sex sexual partners, is associated with a general elevation of risk for anxiety, mood, and substance use disorders, and for suicidal thoughts and plans.").

Various theories exist as to the causation of these conditions. APA Amici attribute these conditions solely to societal prejudice, asserting confidently that "research conducted over four decades has established that 'homosexuality in and of itself bears no necessary relationship to psychological adjustment.'" APA Brief at 11-12.

Relying on three studies conducted between 1978 and 1982, as well as one from 1991, conducted by one of the APA brief authors, this statement blithely ignores the findings of a 2001 study conducted by the same author in which she found and concluded precisely the opposite of her earlier claims. In a study published in the American Journal of Public Health, S.E. Gilman, S.D. Cochran, and others studied the risk of psychiatric disorders among individuals with same-sex sexual partners. Relying on data from the National Comorbidity Survey, a nationally representative household survey, these researchers concluded that "homosexual orientation, defined as having same-sex sexual partners, is associated with a general elevation of risk for anxiety, mood, and substance use disorders, and for suicidal thoughts and plans." S.E. Gilman, et al, *Risk of Psychiatric Disorders Among Individuals Reporting Same-Sex Sexual Partners in the National Comorbidity Survey*, 91 Amer. J. Pub. Health 933-39 (2001). Neither were the researchers able to determine that this correlation was due, in whole or in part, to social stigma, concluding that additional research was needed to explore the "causal mechanisms" underlying the association. *Id.*

Dr. J. Bailey, another researcher on whom APA Amici rely, actually reached a contrary conclusion, noting that "homosexuality may represent developmental error," based upon research connecting homosexuality with "developmental instability." J. Bailey, *Homosexuality and Mental Illness*, 56 Archives of Gen. Psych. No. 10, p. 183-184.

Recent trends of increased social acceptance of homosexuality also fail to support the proposition of APA Amici that psychopathologies linked with homosexuality are due solely to social stigma. In citing to the 2001 report, *Inside-OUT*, APA fail to mention its findings that 76% of gays, lesbians, and bisexuals believe they are more accepted

among the general public now as compared to a few years ago.[26] Moreover, in cities and countries with the highest degree of social and legal acceptance of homosexuality, associated pathology rates are at their highest. In the Netherlands, for example, where same-sex couples are allowed to marry, adopt children, and are generally treated more sympathetically in the law and culture, an important study still concluded that "[p]sychiatric disorders were more prevalent among homosexually active people compared with heterosexually active people" and that "people with same-sex sexual behavior are at greater risk for psychiatric disorders."27

In the face of this data, APA Amici continue to argue strenuously that homosexuality is simply one variant of normal sexual expression, relying in part on the decision of the APA to declassify homosexuality as a mental disorder in 1973. APA Amici depart from the data however, when they suggest that the decision was a scientific decision based on years of research.

At a fundamental level, pathologies are tautologically defined, totally unrelated from the realm of science. Ultimately, homosexuality is not a pathology because the APA declared it to be "normal." A pathology or mental disorder is simply an undesirable abnormality. If normality is defined on a statistical basis, anyone departing from that statistical norm has an abnormal mental condition. When speaking of disorders, however, a psychologist speaks only

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[26] Henry J. Kaiser Family Foundation, Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation (2001).

[27] Theo G. M. Sandfort, et al, *Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study (NEMESIS)*, 58 Archives of General Psychiatry 867 (Jan. 2001).

of those abnormal conditions which society deems undesirable. Social science cannot make the subjective determination as to whether a condition is desirable or undesirable. Whatever good faith considerations may play a role in that decision, it cannot be termed a scientific decision. Where a respected body such as the APA decides to declassify a condition such as homosexuality in spite of its ongoing correlation with other psychopathological disorders, that decision must be attributed to an evolving (and arguably politicized) standard of "normalcy" and "desirability," rather than any underlying scientific developments.

CONCLUSION

For the reasons stated above, this Court should refrain from any reliance upon the uncertain statistical data put forward by the APA, et al. Rather than insert itself into a developing scientific field, the Court should defer to the Texas Legislature in this inquiry, affirming the decision of the court below.

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Appeals for the Fourteenth District

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Titus, "Defining Marriage and the Family," 3 *Wm. & Mary Bill of Rights J.* 327 (1994) 24, 28
W. Blackstone, *Commentaries on the Laws of England* (U. Chi. Facsimile Ed.: 1765) 23, 24
Webster's 1828 Dictionary 21

INTEREST OF AMICI CURIAE

The *amici curiae*, Public Advocate of the United States, Conservative Legal Defense and Education Fund, The Lincoln Institute for Research and Education, Help and Caring Ministries, and Citizen United Foundation are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] All of these *amici* were established, *inter alia*, for public education purposes related to participation in the public policy process, and are tax-exempt under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code.

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to fidelity to the original text of the United States Constitution, including its several Amendments. The Fourteenth Amendment issues presented in this case directly impact the family and are of great interest and importance to these *amici*. In the past, most of these *amici* have filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

SUMMARY OF ARGUMENT

Petitioners' Due Process and Equal Protection arguments rest upon a wrong view of this Court's power of judicial review. Under Marbury v. Madison, this Court has no legitimate power to interpret the Constitution to conform its guarantees to changing circumstances, but only to expound the constitution's permanent principles in accordance with the original text. To that end, this Court is governed by the express terms and federalist structure of the Fourteenth Amendment, not by petitioners' views of evolving societal practices and mores.

Petitioners' contention that the substantive liberty guarantee of the Fourteenth Amendment's Due Process Clause includes the right of adults to choose to engage privately in sex with a consenting adult of the same sex is contrary to precedent. Petitioners err in calling this Court to overturn Bowers v. Hardwick, because the Bowers holding, not the petitioners' revisionist contentions, is consistent with the true meaning of the substantive Due Process liberty guarantee.

Petitioners' contention that the equal protection guarantee of the Fourteenth Amendment prohibits Texas from discriminating between heterosexual and homosexual deviate sexual intercourse is based upon an unproved assumption that a person's sexual behavior is determined by a "deeply rooted personal characteristic." By such an assumption, Petitioners cannot shift the burden to Texas to prove a rational basis or a legitimate purpose for Texas Penal Code Section 21.06.

ARGUMENT

I. PETITIONERS' ARGUMENTS REST UPON FLAWED CONSTITUTIONAL PREMISES.

Petitioners contend that the Fourteenth Amendment's Due Process and Equal Protection clauses invalidate the Texas Homosexual Conduct Act because the United States Constitution should be read by this Court to mirror what petitioners have described as "a strong national consensus reflecting profound judgments about the limits of government intrusive powers in a civilized society." Pet. Br. at 24. According to petitioners, there is a new national consensus that has rejected "both evenhanded and discriminatory bans on private sexual conduct between consenting adults," and therefore, the Due Process and Equal Protection clauses should be construed by this Court to force the people of the State of Texas to abandon their archaic moral views, and to conform their criminal laws governing human sexuality to those of the majority of the other states. Pet. Br. at 22-24.

At stake in this case, then, is not simply whether the Texas Homosexual Conduct Statute violates the Due Process and Equal Protection guarantees of the Fourteenth Amendment. Rather, Petitioners' argument — that this Court should exercise its power of judicial review to impose upon the people of Texas a moral and legal standard not found in the original text of the Fourteenth Amendment, but found in modern sexual mores and the laws of a large majority of Texas's sister states — undermines the very nature of a written constitution, calls for an illegitimate exercise of this Court's Article III judicial power, and breaks with the federalist structure of the United States Constitution.

A. Petitioners' Arguments Undermine the Basis for Judicial Review in Marbury v. Madison.

In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall observed that the "whole American fabric has been erected" upon the principle that "the people have an **original** right to establish, for their future government, such principles as, in their opinion, shall be most conducive to their own happiness." *Id.*, 5 U.S. at 176 (emphasis added). Furthermore, he noted, since this "original right" cannot nor "ought [not] to be frequently repeated," the principles so established must be "deemed fundamental." *Id.* "And, as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be **permanent**." *Id.* (emphasis added). In order that such permanent principles "may not be mistaken, or forgotten," the Chief Justice continued, "the constitution is written" (*id.*), and because it is written, it is a "superior, paramount law, **unchangeable by ordinary means....**" *Id.*, 5 U.S. at 177 (emphasis added).

These twin standards of permanence and unchangeability by ordinary means, the Marbury court stated, arose from the very essence of a written constitution: "This theory is essentially attached to a written constitution, and, is consequently to be considered, by this court, as one of the fundamental principles of our society." *Id.*, 5 U.S. at 176-77. And, as the Marbury court further observed, in declaring "this Constitution" to be the "Supreme Law of the Land," Article VI contained "particular phraseology ... confirm[ing] and strengthen[ing] the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and **that courts, as well as other departments, are bound by that instrument**." *Id.*, 5 U.S. at 180 (emphasis added).

To be sure, the Marbury court also stated that it is "the

province and duty of the judicial department to say what the law is," but, by this statement, it could not have meant that what it "expound[ed] and interpret[ed]" to be the law is superior to the law as stated in the constitutional text (*id.*, 5 U.S. at 177). To the contrary, the Marbury court emphasized that a judge, like a legislator or an executive officer, "take[s] an oath ... 'to faithfully and impartially discharge all the duties incumbent on me according to the best of my abilities and understanding, **agreeably to the constitution** and laws of the United States" (*id.*, 5 U.S. at 180 (emphasis added)), concluding rhetorically:

> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? [*Id.*, 5 U.S. at 180.]

Just because a court, even this Court, states a constitutional rule does not mean that what the court has said is either constitutional or supreme. Rather, as Article VI states, "This Constitution ... shall be the supreme law of the land...."[3]

According to petitioners, however, this declaration in Article VI does not mean what it says. Instead, they have premised

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[3] Even though this Court has stated in Cooper v. Aaron, 358 U.S. 1, 17 (1958), that "Marbury v. Madison ... declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," and therefore, that its "interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the surpeme law of the land," this broad statement does not mean that this Court is not bound by the constitutional text. As Justice Frankfurter, who joined in the Cooper decision, stated "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. O'Keefe, 306 U.S. 466, 491-92 (1938) (Frankfurter, J., concurring). *See also* Meese, "Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution," 61 *Tulane L. Rev.* 979 (1987).

their argument explicitly upon the proposition that this Court may "giv[e] meaning to contemporary truths about freedom, where earlier generations had failed to acknowledge and specify an essential aspect of liberty." Pet. Br. at 20. For example, petitioners have urged this Court to expand the constitutional definition of "liberty" to include "private consensual sexual intimacy," in part, because mental health professionals and other experts have determined that a "gay or lesbian sexual orientation is a normal and natural manifestation of human sexuality." Pet. Br. at 16-17. Even though they claim that this kind of argument is no different from this Court's interpretation of "liberty" in prior cases (*see* Pet. Br. at 19-20), petitioners have constructed an argument not anchored in any way to the original text of the Constitution, but resting on the assumption that the constitution should be modified by this Court to conform to what petitioners have described as a firm break from the Nation's "prior legal tradition of criminalizing many adult choices about private sexual intimacy." Pet. Br. at 21. Additionally, petitioners have called for the overturning of Bowers v. Hardwick, 478 U.S. 186 (1986), not on the grounds that it was wrongly decided, but because, since Bowers, "the Nation has continued to reject the extreme intrusion into the realm of personal privacy approved in that case...." Pet. Br. at 30.

Petitioners' audacious claims constitute a direct assault on Article V of the Constitution which specifies only two means by which the enduring principles of the Constitution may be changed, one by constitutional convention and the other by state legislative ratification of an amendment proposed by Congress.[4] It emphatically does not include changes in the criminal law

[4] Petitioners are seeking what Justice Harlan described as "nothing less than an exercise of the amending power [by the Supreme Court]." Reynolds v. Sims, 377 U.S. 533, 591 (1964).

that have been taking place "[o]ver the last half century" (Pet. Br. at 21-25), nor in "legal, political, and social development[s]" that have taken place since Bowers. *See* Pet. Br. at 30-32. In essence, Petitioners have invited this Court to amend the Due Process and Equal Protection clauses to conform to changes in sexual mores in American society. This Court should decline petitioners' invitation.

B. Petitioners' Arguments Rest upon an Illegitimate View of this Court's Power of Judicial Review.

In order that courts not elevate themselves above the constitution in the exercise of their constitutional duty of judicial review, Chief Justice Marshall's successor, Chief Justice Roger B. Taney, for an unanimous court, articulated the "principle of construction" binding upon the courts when "expounding the Constitution of the United States":

> [E]very word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly added.... Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).]

Thus, "to disregard [the] deliberate choice of words and their natural meaning" has been considered by this Court to "be a departure from the first principle of constitutional interpretation." Wright v. United States, 302 U.S. 583, 588 (1938). Moreover, to ignore the constitutional text in favor of a rule of constitutional interpretation based upon "extrinsic circumstances," as Chief Justice Marshall stated in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819), "would be

dangerous in the extreme":

> [A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. [*Id.*]

Remarkably, petitioners have made no effort whatsoever to couch their due process and equal protection arguments within the four corners of the constitutional text. To the contrary, their brief is dominated by citations to state criminal statutes, law review articles, and sociological and psychological authorities. *See especially* Pet. Br. at 17-18 and fn. 10-12, 20, 25, 30, 34-35. True, petitioners have sprinkled their brief with citations and quotes from constitutional opinions of this Court, but these are lifted out of context, both factual and legal. Petitioners' use of language from Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973), and their citation to Planned Parenthood of S. E. Pa. v. Casey, 505 U.S. 833, 851 (1992), is illustrative:

> Sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). One's sexual orientation, the choice of one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty. *Cf. Casey*, 505 U.S. at 851. Thus, the essential associational freedom here is the freedom to structure one's own private sexual intimacy with another adult. [Pet. Br. at 12-13 (footnote omitted).]

When placed in context, petitioners' quotation from Paris Adult Theatre is highly misleading:

> The sum of experience, including that of the past two decades, affords ample basis for legislatures to conclude that *a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality*, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. [Paris Adult Theatre I v. Slaton, 413 U.S. at 63 (N.B. the language from case quoted in Petitioner's Brief appears in italics).]

Had petitioners made accurate use of Paris Adult Theatre, they could not have utilized the selected passage as the foundation for reaching their conclusion that an "essential associational freedom" includes "the freedom to structure one's own private sexual intimacy with another adult." To the contrary, the passage that immediately followed the one quoted in petitioners' brief provides no support for their position:

> It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice.... Totally unlimited play for free will, however, is not allowed in our or any other society.... [Some] laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. [*Id.*, 413 U.S. at 63-64.]

In an effort to escape the implications of Paris Adult Threatre I, petitioners have interposed a citation to Casey, but there is nothing in Casey that says anything about "sexual orientation,"

"choice of one's partner" or "how to connect sexually." *See* Casey, 505 U.S. at 851.

By their misuse of Paris Adult Theatre I and Casey, petitioners have confirmed the necessity for Chief Justice Marshall's admonition in Sturges, not to allow "extrinsic circumstances" to determine the meaning of a constitutional text, but to discern the meaning from the words themselves within the structure of the written constitution. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-24 (1819).

C. Petitioners' Arguments Disregard the Fourteenth Amendment's Federalist Structure.

Underlying petitioners' entire brief is the assumption that the United States of America is a unitary civil society in which every state must conform its public policy to a national norm. Thus, in support of their due process privacy contention petitioners have argued that (1) "the Nation has firmly broken from its prior legal tradition of criminalizing many adult choices about private sexual intimacy" (Pet. Br. at 21), (2) "the Nation has continued to reject the extreme intrusion into the realm of personal privacy" (Pet. Br. at 30), and (3) "the Nation has steadily moved toward rejecting second-class-citizen status for gay and lesbian Americans" (Pet. Br. at 30-31).

In support of their equal protection claim, petitioners have similarly argued (1) "our Nation has no legal tradition making the criminality of private sexuality turn on whether a couple is homosexual or heterosexual," and (2) "the laws of this Nation have reflected and played a role in virulent anti-gay discrimination over the last century" (Pet. Br. at 45).

As a matter of fact, however, the change in the criminal law governing human sexual conduct has come about state by state,

grounded upon policy considerations concerning the limits on the criminal sanction,[5] and not upon a monolithic national plebiscite on the morality of private adult homosexual conduct, as petitioners have implied. *See* Pet. Br. at 21-24.

In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court rejected the proposition that the Fourteenth Amendment's Due Process and Equal Protection Clauses imposed a national standard of substantive individual rights upon the states. In doing so, the Court affirmed that the Fourteenth Amendment was not designed to constitutionalize the exercise of the several States' police powers, but left it to the individual States to formulate and implement their policies governing the health, safety, welfare, and morals of the people, subject only to the procedural requirements of the Due Process Clause and the anti-racial discrimination policy of the Equal Protection Clause. *Id.*, 83 U.S. at 74-82.

While the narrow interpretation of the two clauses endorsed by the Slaughter-House Court has not been followed, this Court has not rejected its federalist principle. Rather, it has recently affirmed that the Fourteenth Amendment should not be construed in such a way as to permit Congress, in the exercise of its enforcement powers under Section 5, "to intrude into the traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." City of Boerne v. Flores, 521 U.S. 507, 521 (1997). Indeed, in two recent cases this Court has struck down congressional efforts under the Commerce Clause because they intruded upon the police powers preserved to the States by the Tenth Amendment. United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

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[5] *See* H. Packer, *The Limits of the Criminal Sanction* 301-12 (Stanford Univ. Press: 1968).

In Lopez, the Court ruled against an expansive view of the federal commerce power lest it enable Congress to "regulate any activity found related to economic productivity of individual citizens: family law (including marriage, divorce, and child custody) [and] even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.*, 514 U.S. at 564. In Morrison, the Court not only struck down an effort by Congress to criminalize "gender-motivated violence," as outside of the scope of the Commerce Clause, but it also rejected the claim that Congress had authority under the Fourteenth Amendment to enact a statute providing for a civil remedy against the perpetrator of a gender-motivated violent crime even though Congress had marshaled evidence that such a statute was designed to combat "pervasive bias in various state justice systems against victims of gender-motivated violence." Morrison, 529 U.S. at 619. Again the Court emphasized that the limitations placed on the exercise of congressional power under the Fourteenth Amendment were "necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *Id.*, 529 U.S. at 620. In support, the Court, citing Boerne, stated that both history and contemporary belief affirms that "the [Fourteenth] Amendment 'does not concentrate power in the general government for any purpose of police government within the States.'" *Id.*, 529 U.S. 620-21.

Although these rulings concern the power of Congress under Section 5 of the Fourteenth Amendment, the same federalist principles have informed and limited the power of the courts in construing the reach of the Fourteenth Amendment. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883). Additionally, in construing the substantive due process and equal protection guarantees, this Court has been acutely aware of the limits placed upon the exercise of judicial power by both "the

language [and] design of the Constitution." Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). Thus, in Bowers, the Court declined to take an "expansive view of [its] authority to discover new fundamental rights embedded in the Due Process Clause." *Id.*, 478 U.S. at 194.

In their brief, petitioners have advanced arguments that, if accepted by this Court, cannot be confined to striking down the Texas statute criminalizing homosexual conduct. With respect to their Due Process contentions, their reliance upon modern trend to decriminalize such conduct as support for constitutionalizing that trend is equally applicable to similar trends in the areas of outlawing discrimination against "sexual orientation" in housing, public employment, public accommodations, and other areas, as well as hate crimes, and child adoption. *See* Pet. Br. at 17-19. Thus, at bottom, petitioners' due process arguments rest upon a claim that heterosexuals and homosexuals should be treated alike, lest "gay and lesbian Americans" be reduced to second class citizenship. *See* Pet. Br. at 16, 18, 30-31. Indeed, petitioners' equal protection claim rests explicitly upon the proposition that Texas's Homosexual Conduct Law "make[s] gay people unequal in myriad spheres of everyday life and continue[s] an ignominious history of discrimination based on sexual orientation." Pet. Br. at 34. Thus, petitioners condemn the criminalization of homosexual conduct because it "formalizes [a] pejorative classification of lesbians and gay men as second-class citizens," not entitled to the same child custody and visitation rights, foster parent rights, and employment opportunities as heterosexuals. Pet. Br. at 41-44.

In summary, petitioners' due process and equal protection contentions go far beyond this case: Not only must homosexual conduct be decriminalized, but any and all distinctions based upon "sexual orientation" must be discarded in favor of a new

definition of "family" that would include recognition of homosexual unions on the same basis as heterosexual. *See* Pet. Br. at 16-19. Such a wholesale adoption of the gay rights agenda to be imposed upon the states as a matter of law is insupportable, unwarranted either by the constitutional text or by this Court's opinions.

II. THE "ADULT" CHOICE TO ENGAGE IN PRIVATE CONSENSUAL HOMOSEXUAL SEX IS NOT A LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners have frankly admitted that their claim — that adults have a "fundamental right" to engage in homosexual sodomy — is not "enumerated" in the Due Process Clause of the Fourteenth Amendment. Pet. Br. at 10. Instead, they claim that such a right may be extrapolated from this Court's recognition of "three well-recognized aspects of personal liberty — in intimate relationships, in bodily integrity, and in the privacy of the home." Pet. Br. at 11. Thus, according to petitioners, "[t]he well-established fundamental interests in intimate relationships, bodily integrity, and the sanctity of the home all converge in the right asserted here." Pet. Br. at 9. This is not true. Neither this Court's opinions nor the text of the Fourteenth Amendment Due Process Clause guarantees an adult's choice to engage in consensual homosexual sex.

A. Petitioners' Claimed Liberty Interest Has No Support in this Court's Opinions.

1. Intimate Relationships. Cobbling together isolated phrases lifted from Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984), Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965), Eisenstadt v. Baird, 405 U.S. 438, 453 (1972),

Planned Parenthood of S.E. Pa. v. Casey, *supra*, 505 U.S. at 851, 852, 898 (1992), and Paris Adult Theatre I v. Slaton, *supra*, 413 U.S. at 63, petitioners have created a new "associational freedom" — never before recognized by this Court — "to structure one's own private sexual intimacy with another adult." Pet. Br. at 11-12.

In Roberts v. United States Jaycees — upon which petitioners have placed primary reliance for their claim of a well-recognized general liberty interest in "intimate associations" — this Court stated just the opposite, asserting that "[t]he Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of **certain** kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.*, 468 U.S. at 618 (emphasis added). In support of this proposition the Court cited two of its most venerable precedents, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), and Meyer v. Nebraska, 262 U.S. 390, 399 (1923). In Meyer, the Court laid down the legal parameters by which it would be governed in determining whether any particular claim of individual liberty was protected by the Due Process clause of the Fourteenth Amendment:

> While this Court has not attempted to define with exactness the liberty thus guaranteed.... Without doubt, it denotes not merely freedom from bodily restraint, but also the right..., **generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men.** [Meyer v. Nebraska, *supra*, 262 U.S. at 399 (emphasis added).]

While the Court in Roberts recognized that the common law boundary set by Meyer had been extended, it did not embrace the open-ended case for "intimate associations" claimed by

petitioners. To the contrary, the Court reaffirmed that recognition of "certain kinds of personal bonds" as within the concept of ordered liberty depended upon whether such bonds "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." Roberts v. United States Jaycees, 468 U.S. at 618-19.

Following these recognized common law and traditional guidelines, as reaffirmed in Roberts, this Court in Bowers v. Hardwick, declined to recognize that Fourteenth Amendment "liberty" included a "fundamental right to homosexuals to engage in acts of consensual sodomy," dismissing such a claim in the light of long tradition criminalizing such conduct as "at best, facetious." *Id.* 478 U.S. at 192-94. Contrary to petitioners' assertion (*see* Pet. Br. at 30-32), then, Bowers is not an "isolated decision," undeserving the protection of the principle of stare decisis. Rather, Bowers represents a correct application of this Court's precedents protecting, in the language of Roberts, only those intimate associations that have played a "critical role in the culture and tradition of the Nation."

2. Bodily Integrity. Petitioners' case for overturning Bowers fares no better if it is based upon precedents that, according to petitioners, establish a liberty interest in "bodily integrity." Mining Casey, Washington v. Glucksberg, 521 U.S. 702 (1997), Rochin v. California, 342 U.S. 165, 166, 173-74 (1952), and Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278 (1990), petitioners have claimed to have found an established liberty interest in "control over one's body ... in sexual relations, involving as they do the most intimate physical interactions conceivable." Pet. Br. at 13. Again, petitioners have made a wholly unwarrantable claim that this Court has recognized a wholesale right in "bodily integrity," when the very cases cited by petitioners prove otherwise.

In Casey, as one of the quoted passages in petitioners' brief clearly indicates, the references to bodily integrity were in support of a pregnant woman's right to an abortion, not to "bodily integrity" generally. That right, in turn, was premised in Roe v. Wade, 410 U.S. 113 (1973), on an assessment of common law history reflecting, in the majority's opinion, a limited right of a woman to obtain an abortion. *Id.*, 410 U.S. at 140-41. After Casey, when presented with a claim that physician-assisted suicide also qualified as a protected liberty interest, this Court declined to so rule, noting that there was no evidence either of a common law or a traditional "right" to commit suicide, and thus, the claim fell short of the first of two primary features of "substantive-due process analysis." Glucksberg, 521 U.S. at 710-15, 720-23. Furthermore, this Court reiterated its position that any due process substantive liberty claim must be carefully and specifically described, not based upon generalities such as the ones employed by petitioners in their brief. *Id.*, 521 U.S. 723-27. *See also* Cruzan, 497 U.S. at 269-71, 278-79.

A correct reading of Casey in light of Glucksberg and Cruzan, then, is that this Court has recognized a liberty interest in "bodily integrity" where such an interest has long been established at common law, or where the common law did not clearly condemn the claimed interest. As pointed out in Bowers, any claim of a right to engage in sodomy based upon an asserted interest in "bodily integrity" fails because of the unequivocal common law condemnation of the practice. Bowers, 478 U.S. at 192. Whatever has happened since Bowers cannot change that fact.

3. The Privacy of the Home. Petitioners' final appeal is that there is an established liberty interest in private adult consensual sodomy because of the "deeply entrenched interest in the privacy of the home." Pet. Br. at 14. Once again,

petitioners have taken isolated sentences from this Court's opinions and constructed a new privacy right out of whole cloth, elevating the home to a safe "sanctuary, privileged from prying eyes" (Pet. Br. at 15, n. 9), a "safe" harbor from government intrusions. Pet. Br. at 14-15. Citing First and Fourth Amendment cases, as well as from the standard privacy repertoire of Griswold v. Connecticut, 381 U.S. 479 (1965), and Stanley v. Georgia, 394 U.S. 557 (1969), petitioners have carved out a privacy right that, unlike all but Griswold, found a right that is shaped primarily by the fact that the activity in question was taking place in the home. This point is especially significant in assessing the legitimacy of petitioners' analogical reasoning from the Fourth Amendment cases. There is no doubt that the home has received heightened protection of the Fourth Amendment's warrant requirement, but it has never been recognized as a constitutionally protected "sanctuary," immunizing its occupants from any government intrusion whatsoever, or protecting from such intrusions when the probable cause relates to intimate activity engaged in consenting adults. *Cf.* Bowers., 478 U.S. at 195-96.

On the other hand, the Fourth Amendment warrant requirement has been tailored to whether a search and seizure takes place in a home,[6] a hotel room,[7] a car,[8] an open field,[9] or a commercial establishment.[10] Petitioners, however, have not contended in this case that the right to engage in consensual

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[6] Kirk v. Louisiana, 536 U.S. 635 (2002).

[7] United States v. Jeffers, 342 U.S. 48 (1951).

[8] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[9] Oliver v. United States, 466 U.S. 170, 176-77 (1984).

[10] Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

homosexual conduct varies depending whether it takes place in the home, as contrasted to a hotel room, a car, a secluded place on a beach, or even in a private room made available to a couple by a commercial bathhouse. For this reason alone, petitioners' effort to link their claim to the "privacy of the home" interests should be dismissed as specious.

B. Petitioners' Claimed Liberty Interest Has No Support in the Fourteenth Amendment's Due Process Clause.

Apart from including the due process language in the Fourteenth Amendment in the Statutory and Constitutional Provisions section of their brief, petitioners have paid no attention whatsoever to the text, context and history of the Due Process Clause of the Fourteenth Amendment. And for good reason. Neither the text, nor the context, nor the history of the Due Process Clause provides any support for petitioners' claim.

1. Person. Texas Penal Code Section 21.06 provides that "[a] **person** commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." (Emphasis added.) In their Argument Summary, Petitioners claim that this section of the Homosexual Conduct Law is unconstitutional, but only as applied to "adults," not as applied to persons who are not adults:

> Section 21.06 puts the State of Texas inside its citizens' homes, policing the details of their most intimate and private physical behavior and dictating with whom they may share a profound part of **adulthood**." [Pet. Br. at 8 (emphasis added).]

> Fundamental liberty and privacy interests in **adults'** private, consensual sexual choices are essential to the ordered liberty our Constitution protects. [Id. (emphasis added).]

Throughout Argument I, petitioners have consistently identified the liberty interest they claim as one enjoyed by "adults."[11]

According to petitioners, then, the fundamental right to engage in private consensual sodomy is limited to adults. But the Due Process Clause applies to "persons," not just to adults. As this Court has consistently held in its abortion opinions, the liberty interest enjoyed by a woman to terminate her pregnancy extends to minors, as well as to adults. *See, e.g.,* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not ... come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, ... possess constitutional rights.") While the minority status of a person may be a factor permitting certain due process restrictions upon her access to an abortion that could not be placed upon that person if she were an adult, her minority status does not mean that she has no liberty interest at all. *See* H. L. v. Matheson, 450 U.S. 398 (1981). By claiming that only adults have a liberty interest protected by the Due Process Clause, petitioners have done violence to the text, relegating minors to nonpersons, without any effort whatsoever to provide textual support for their position. *Compare* Roe v. Wade, *supra*, 410 U.S. at 156-57.

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[11] "All adults have the same fundamental liberty interests in their private consensual sexual choices." Pet. Br. at 11. "The adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association." *Id.* at 12. "For many adults in modern society, sexual intimacy is an important aspect of forming or building committed relationship where one does not already exist." *Id.* at 12, n. 8. "If heterosexual adults have a fundamental interest in consensual sexual intimacy ... then so too must homosexual adults." *Id.* at 19. "[B]oth evenhanded and discriminatory bans on private sexual conduct between consenting adults have been rejected in contemporary times." *Id.* at 22. "Texas Cannot Justify Section 21.06's Criminal Prohibition of Petitioners' and Other Adults' Private Sexual Intimacy." *Id.* at 25.

Had petitioners attempted to provide textual support for their position, it would have failed. As this Court pointed out in Roe, the "Constitution does not define 'person' in so many words." *Id.,* 410 U.S. at 156. Nevertheless, there are several provisions in that document decisively indicating that "person," standing alone, cannot be limited by age. *See* Article I, Section 2, Clause 2 (" No person shall be a Representative who shall not have attained the age of twenty five"); Article I, Section 3, Clause 3 ("No person shall be a Senator who shall not have attained to the Age of thirty years"); and Article II, Section 1, Clause 5 ("Neither shall any person be eligible to that Office [President] who shall not have attained the Age of thirty five years.") By not placing any age limitation upon the Due Process text, the Fourteenth Amendment's use of the word, person, like the Fifth Amendment, mirrors the definition of person found in Webster's 1828 Dictionary: "An individual human being consisting of body and soul.... A man, woman or child."

2. Liberty. Liberty, like person, is not defined within the four corners of the Constitution. But the word does appear in two other places, the Fifth Amendment and the Preamble. Both provisions shed light on the meaning of the term.

Both the Fifth Amendment and the Fourteenth Amendment use "liberty" in relationship to due process and, except for a slight difference in phrasing, contain identical due process language, the Fifth applying to the federal government and the Fourteenth applying to the States. On their face, there is no reason to give a different definition to any of the key terms, even though the Fifth Amendment was ratified and made a part of the Constitution in 1791 and the Fourteenth in 1868. Indeed, the right not to be deprived of one's life, liberty, or property has ancient roots, traceable all the way back to the "law of the land" chapter of the 1215 Magna Carta. *Sources of Our Liberties* 5-6

(R. Perry, ed., ABA Law Found.: 1972) (hereinafter "*Sources*"). Even at the time of America's founding, the right to due process was still being stated in "law of the land" terms, although in restating the right, the word "liberty" became attached to it. Thus, Section 8 of the June 1776 Virginia Declaration of Rights read, in part: "that no man be deprived of his liberty, except by the law of the land." *Sources,* at 312. *Accord,* Article IX, *Aug. 1776 Constitution of Pennsylvania,* reprinted in *Sources* at 330. Thereafter, several state constitutions added "life" and "property" to their "law of the land" provisions. *See*, e.g., Article XXI, *1776 Constitution of Maryland*, reprinted in *Sources* at 348. The Fifth Amendment tracked these early state developments, incorporating verbatim "life, liberty or property," but substituting due process of law for law of the land.

The state constitutional commands protecting "liberty" by due process of law, then, predated both the Fifth and Fourteenth Amendments. Significantly, these state constitutions contained language defining the substantive meaning of liberty. According to the *1776 Pennsylvania Constitution*, "liberty" was a "natural, inherent and inalienable right," not one created by the constitution, but preexisting in the nature of things. Article I, *1776 Pennsylvania Constitution*, reprinted in *Sources* at 329. *Accord,* Section 1, *1776 Virginia Constitution*, reprinted in *Sources* at 311. This same notion of a preexisting natural right of liberty is affirmed in the Preamble to the United States Constitution, which states that the Constitution was "ordain[ed] and establish[ed]," in part, to "**secure** the blessings of liberty to ourselves and our posterity." (Emphasis added.) This language, in turn, tracked the words of the nation's charter, the Declaration of Independence, which states that "governments are instituted among men" to "**secure**" the "inalienable rights of life, liberty and the pursuit of happiness." The Declaration,

like the early Virginia and Pennsylvania Constitutions, identifies those inalienable rights as preexisting. In the case of the Declaration, and hence the United States Constitution, those rights are "endowed by the Creator" and enjoyed by all mankind because "all men are created equal."

The original substantive concept of liberty, embraced by the Constitution, including the Fifth and Fourteenth Amendments, must be understood as having been established by the Creator, and thus preexisting according to the created nature of the mankind, not as having been established according to societal conventions, constitutional, communitarian, or otherwise. In this case, however, Petitioners have adopted the latter, rather than the former, as the source of their substantive definition of liberty. In their brief petitioners make no reference to any preexisting natural right to engage in homosexual conduct, but only to an evolutionary conventional right derived from the way people live — "Today, family lives centered on same-sex relationships are apparent in households and communities throughout the country" (Pet. Brief at 16) — and reinforced by selected opinions of sociological and psychological professionals — "Mental health professionals have universally rejected the erroneous belief that homosexuality is a disease." *Id.* at 16. Such a view of liberty may support a gay and lesbian **political** agenda, but it provides no support whatsoever for the establishment of a **constitutional** right.

To the contrary, liberty — when used in a constitution — is not a sociological or psychological term. Rather, it is a legal term, and as established in Part I. A. above, a legal term unchangeable by ordinary means, and thus determined by its original meaning, not by any evolutionary process. At the time of America's founding, a "natural liberty of mankind" was constrained by "the law of nature." I W. Blackstone, *Commentaries on the Laws of England* 121 (U. Chi. Facsimile Ed.: 1765). The law of nature, in turn, was the will of the

Maker of the universe and of all mankind, as revealed in nature; and no human laws could be of any validity if contrary to this original law. *Id.* at 39-40, 41. According to the "law of nature," sex between human beings of the same sex was a "crime against nature," deserving punishment, not commendation. IV W. Blackstone's *Commentaries* at 215-16.

Thus, if this Court should affirm petitioners' claim that the substantive meaning of liberty in the Fifth and Fourteenth Amendment's Due Process clauses has evolved to include freedom of choice to engage in homosexual sex — determined at the time the Constitution was ratified to be a "a disgrace to human nature" and "a crime not fit to be named" (IV Blackstone's *Commentaries* at 215-16) — then it would be rejecting the divine source of rights upon which this nation was founded. *See* Titus, "Defining Marriage and the Family," 3 *Wm. & Mary Bill of Rights J.* 327, 337-41 (1994).

This Court got it right in Bowers, when it ruled that liberty could not possibly be construed to embrace a right to engage in homosexual conduct in light of the historic fact that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." Bowers, 478 U.S. at 192. To have ruled otherwise, would have made a mockery of the founder's understanding that the very essence of a written constitution is to preserve the people's "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness" and that of their posterity. *See* Marbury v. Madison, *supra,* 5 U.S. at 176.

III. THE EQUALITY PRINCIPLE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT A LAW DISCRIMINATING BETWEEN HOMOSEXUAL AND HETEROSEXUAL CONDUCT.

After having devoted the first 22 pages of their Argument to the claim that Texas Code Section 21.06 denies to "gay and lesbian Americans" the same freedom of choice "as heterosexuals in private consensual sexual intimacy" (Pet. Br. at 16), Petitioners have invested their concluding 18 pages to the claim that gay and lesbian Americans are being discriminated against for engaging in an activity in which they have no choice. Indeed, the explicit premise of the petitioners' equal protection argument is that neither homosexuals nor heterosexuals have any real choice over their sexual lives, they are just differentially sexually oriented:

> There are no valid concerns of the government here that correlate with sexual orientation, which is a deeply rooted personal characteristic that we all have. [Pet. Br. at 39.]

Thus, petitioners have contended that while ostensibly the Texas statute condemns homosexual conduct, in reality, it "brand[s] gay citizens as criminals by virtue of their sexual orientation." Pet. Br. at 41.

According to this line of reasoning, there can be no possible moral foundation for Texas to discriminate between homosexuals and heterosexuals. After all, no one can be condemned for behaving in the way that he or she has been

programmed to behave.[12] Therefore, one cannot but conclude that the Texas legislature has enacted Texas Code Section 21.06 solely on the basis of a majority heterosexual's "negative attitude toward those with a particular personal characteristic," not because of any true "moral" condemnation. Pet. Br. at 39.

The first problem with petitioners' argument is that they have assumed the very thing that they must prove, namely, that sexual orientation is an immutable characteristic implanted at birth like the color of one's skin or sex, in order to sustain their claim that they are being denied equal protection of the laws. *See,* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The second problem is even more fundamental. Petitioners must prove that one's sexual orientation absolutely compels one to engage only in sexual intercourse consistent with that orientation. Otherwise, the Homosexual Conduct Law is no more a condemnation of a person's homosexual orientation than a murder statute is a condemnation of a person's homicidal orientation.

Not surprisingly, petitioners have attempted neither task. Instead, they have subtly shifted the burden of having to prove a violation of the equal protection clause, placing the burden on Texas that Section 21.06 does not violate equal protection principles.

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[12] Instead, Petitioners believe that the ones who should be condemned are – those who offer "discredited 'therapies' to 'change' the very sexual orientation of gay adults [for] continu[ing] th[e] destructive pathologizing of gay citizens." Pet. Br. at 46. By enacting Texas Code Section 21.06, the Texas legislature should also be condemned for "brand[ing] gay persons, as second-class citizens and legitimiz[ing] discrimination against them in all aspects of life." Pet. Br. at 40-41.

A. Having Failed to Negative Any Conceivable Rational Basis for Texas Code Section 21.06, Petitioners Have Failed to Meet Their Burden to Prove an Equal Protection Violation.

According to petitioners, "[u]nder the Equal Protection Clause, the classification — the different treatment of different people — ... must be justified" by the State. Pet. Br. at 34. Thus, they have contended, Texas must justify its decision to criminalize "deviate sexual intercourse" between persons of the same sex, but not such intercourse between persons of the opposite sex. After reviewing the Texas justifications, petitioners have concluded:

> Texas offers nothing more than the majority's negative moral judgment to support its discrimination, and that should end the matter with a ruling of unconstitutionality. [Pet. Br. at 40.]

Petitioners have grossly misstated the law. First, contrary to petitioners' contention, Texas does not have the burden to justify its having distinguished between homosexual and heterosexual conduct in criminalizing deviate sexual intercourse. To the contrary, the very case cited by the petitioners in support of their argument that Texas bears the burden of justification says just the opposite:

> [T]he State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative "any conceivable state of facts that could provide a rational basis for the classification." [Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001).]

Second, "under rational-basis review, where a group

possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Id.* In this case, petitioners have not shown that its differential treatment of homosexual and heterosexual deviate intercourse is not permissible to reinforce the moral foundation of its family policy that permits heterosexuals, but not homosexuals, to marry. *See* Lawrence v. Texas, 41 S.W.3d 349, 354 (2001), citing Grigsby v. Reib, 105 Tex. 597, 607, 153 S.W. 1124, 1129 (Tex. 1913).[13] If the benefits of marriage may be withheld on such a differentiated basis, then so can different burdens be imposed upon the two classes because they are not similarly situated. *See, e.g.,* McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 807-11 (1969).

B. Having Failed to Show that Section 21.06 Has No Legitimate Purpose, Petitioners Have Failed to Sustain Their Burden to Prove an Equal Protection Violation.

Petitioners have argued that "Section 21.06 ... use[s] a sexual-orientation-based classification." Pet. Br. at 32, n. 24. It does not. The phrase "sexual orientation" does not appear in the statute, and thus, is not an element of the offense. A person whose sexual orientation is heterosexual may be convicted of the crime of deviate sexual intercourse, just the same as a

[13] According to Grigsby, Texas marriage policy is rooted not in societal convention, but in a system of "duties and obligations that have existed ... before civil government was formed": "[A] status ordained by God, the foundation and support of good government, and absolutely necessary to the purity and preservation of good society." *Id.*, 153 S.W. at 1129, 1130. *See also* Titus, "Defining Marriage and the Family," *supra*, 3 *Wm. & Mary Bill of Rights J.* at 342-43.

person whose orientation is homosexual. Lawrence v. Texas, *supra,* 41 S.W.3d at 353. To prove otherwise, petitioners must show that persons with a heterosexual orientation would **never** engage in sexual intercourse with a person of the same sex. Petitioners have suggested that such is the case, but they have offered no such evidence. Pet. Br. at 32-34. Because petitioners have failed to show that people's behavior is fixed by their sexual orientation, petitioners' case that Section 21.06 violates the equal protection clause by discriminating against persons with a same-sex orientation fails miserably.

In order, then, for petitioners to make a case, they must prove that the Texas legislature acted with an illegitimate purpose. Other than making the bald assertion that the Homosexual Conduct Law has "targeted" gay people, petitioners have rested their case of purposeful discrimination on "a century-long history of discrimination against gay Americans." Pet. Br. at 41, 46. Thus, petitioners have argued that "even in the absence of actual arrest and prosecution, the Homosexual Conduct Law labels gay men and lesbians as criminals and legitimates discrimination against them on that basis." Pet. Br. at 44. One could say the same thing about laws prohibiting incest, adultery, bestiality, and adult sex with children. After all, according to petitioners' world view those who engage in such crimes are only acting in the way that their particular orientation compels them. One might even say the same thing about laws prohibiting murder, theft, or any other of a host of statutes prohibiting certain conduct.

At bottom, petitioners' argument denies that, with regard to sexual behavior, there are moral choices, only preferences predetermined by "a deeply rooted personal characteristic," a "status" for which none may be held responsible. *See* Pet. Br. at 39-40. Ironically, by making this claim they are reducing themselves and all other human beings — at least in relation to

sexual behavior — to something less than human, which is a distortion of the original purpose of the equal protection clause. As Justice John Marshall Harlan put it, in his dissenting opinion in Plessy v. Ferguson, 163 U.S. 537 (1896), the equal protection clause was designed to guarantee that the law will "regard[] man as man." *Id.*, 163 U.S. at 559. Petitioners have argued otherwise, pressing this Court to adopt their deterministic views about sexual behavior. It is one thing for a state legislature to embrace such an agenda; it is quite another for this Court to enshrine as part of the Fourteenth Amendment's equality principle the notion that adults are so helplessly in bondage to a sexual proclivity that no legitimate moral judgment can be made about their sexual actions — so long, of course, as those actions are consensual and private.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Texas, Fourteenth District, should be upheld.

Respectfully submitted,

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No. 02-102

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS

Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas Fourteenth District

BRIEF OF AMICUS CURIAE AGUDATH ISRAEL OF AMERICA IN SUPPORT OF RESPONDENT

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IN THE
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BRIEF OF AMICUS CURIAE AGUDATH ISRAEL OF AMERICA IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

Amicus curiae Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization with constituents all across the United States, including Texas.[1] Our

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[1] Pursuant to Supreme Court Rule 37.3(a), we have obtained from all parties their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for the amicus certifies that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the amicus, has made a monetary contribution to the preparation or submission of this brief.

interest in this case is based in part on the classical Jewish view of homosexual activity, which is stated quite clearly in Leviticus 18:21: "You shall not lie with a man as one lies with a woman, it is an abomination."[2]

Yet we are submitting this brief not because we advocate that the modern-day secular state should use its police power against persons who engage in homosexual sodomy, but because we are deeply concerned about the potential far-reaching consequences of a decision that states are constitutionally prohibited from doing so – especially if the foundation for such a decision is a de-valuation of the state's interest in laws that are premised on considerations of traditional morality. As discussed more fully in our arguments that follow, the possible ramifications of any such ruling extend far beyond the ongoing viability of the

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[2] Amicus curiae The Commission on Social Action of Reform Judaism cites the teaching of Genesis 1:27--that all human beings are created in the Divine image--to show that "we are all . . . deserving of equal treatment." Brief of the Alliance of Baptists, The American Friends Service Committee, The Commission on Social Action of Reform Judaism, et al., at 2a. This is presumably the theological justification for the Reform Jewish position of "supporting and affirming" the "personal relationships" of "gay and lesbian people", including support for recognition of same-sex marriage. Ibid. at 11, citing the 1997 resolution of the General Assembly of the (Reform) Union of American Hebrew Congregations that urged "support [for] secular efforts to promote legislation which would provide through civil marriage equal opportunity for gay men and lesbians." Unlike our Reform brethren, we believe that the Author of Genesis 1: 27, in Whose Image we are all indeed created, also wrote Leviticus 18:21; and that Leviticus 18:21 means exactly what it says.

rarely enforced anti-sodomy laws of Texas and a dwindling minority of other states, perhaps even leading to the jettisoning of many if not all morality-based laws. As representatives of a community that believes that adherence to a moral code of conduct is the very essence of man's role in the world, we view such prospects with considerable alarm.

Accordingly, while this case raises a number of other important issues as well, our focus as amicus curiae will be on the narrow, but fundamental, issue of the constitutionally proper role of public morality in the legislative process of making law.

ARGUMENT

I.

THE GOVERNMENTAL INTEREST IN LAWS THAT REFLECT AND PROMOTE STANDARDS OF MORALITY IS RATIONAL, SUBSTANTIAL, EVEN COMPELLING

Petitioners assert two constitutional bases for their challenge to the Texas anti-sodomy statute: equal protection and privacy. We note, at the outset, our agreement with the analysis of the court below on each of these points. With respect to equal protection, the statute draws no distinctions between the sexes; its proscriptions and punishments apply to men and women alike. Accordingly, equal protection scrutiny of the statute should be minimal, satisfied by no more than the finding of a legitimate governmental interest and a rational basis for the law. Similarly, with respect to the asserted right of privacy, so long as this Court adheres to its ruling in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), that there is no fundamental right to engage in homosexual sodomy, any legitimate rational basis for the law will shield it from constitutional attack.

Petitioners and their amici supporters contend, however, that the Texas law does not even meet the minimal scrutiny rational basis test, because the state has no legitimate interest in prohibiting homosexual sodomy. They further contend that, in any event, Texas should be required to show something more than a legitimate governmental interest and rational basis for its anti-

sodomy law – either because the law should be seen as a gender-based classification, in which case the state would have to satisfy the "intermediate scrutiny" standard of showing a substantial relation between the law and an important governmental interest; or because, contrary to the holding in *Bowers*, the Texas law does implicate a fundamental privacy right, in which case the statute should be held to the "strict scrutiny" standard of being narrowly drawn to meet a compelling governmental interest. Surely, petitioners contend, there is no conceivable state interest that meets these higher scrutiny standards.

These contentions fundamentally misconceive and undervalue the government interest in laws that reflect and promote broadly held conceptions of public morality. It has long been recognized that laws premised on a legislature's conceptions of public morality are entitled to substantial deference. *See, e.g.*, *Hoke v. United States*, 227 U.S. 308, 321 (1913) ("There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime"). As the Eleventh Circuit recently stated in *Williams* v. *Pryor*, 240 F.3d 944, 949 (11th Cir. 2001), a case involving a legislative ban against the sale of certain sexual devices, "The State's interest in public morality is a legitimate interest rationally served by the statute. The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."

That the Texas statute at issue here is a law based on the legislature's sense of public morality cannot seriously be questioned. The Court in *Bowers*, 478 U.S. at 1992-94, as well the court below, correctly trace the longstanding social consensus that the practice of homosexual sodomy is immoral. Indeed, it is because "the law… is constantly based on notions of morality" that the Court ruled in *Bowers*, 478 U.S. at 196, that "majority sentiments about the morality of homosexuality" furnish a sufficient basis to uphold anti-sodomy laws against due process attack.

As noted above – and for the reasons detailed in the decision below, and in *Bowers*, and in the briefs of Respondents and their other supporting amici – we take issue with the notion that Texas must justify its law through the showing of a state interest that is not merely "legitimate," but "substantial" or even "compelling". But even if the Court concludes otherwise, there is ample authority for the proposition that the state's interest in morality-related laws is more than merely "legitimate". For example, in *Barnes* v. *Glenn Theatre*, 501 U.S. 560, 569 (1991), the Court concluded that a "public indecency statute furthers a *substantial* government interest in protecting order and morality" [emphasis added], thereby shielding it from free speech attack. This led the Eleventh Circuit to note in *Williams* v. *Pryor*, *supra*, 240 F. 3d at 949 (n.3): "In fact, the State's interest in public morality is sufficiently substantial to satisfy the government's

burden under the more rigorous intermediate level of constitutional scrutiny applicable in some cases."

Further, in at least one area of the law – the state's authority to regulate certain aspects of marriage – it has been recognized that the government's interest in preserving social morality is so great as to be "compelling." As a result, statutes that restrict the right of individuals to marry whom they please have consistently been upheld by the courts – despite the fact that, as the Court has recognized on numerous occasions (*e.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312, 314, (1976)), the right to marry is a fundamental right, and statutes that interfere with that right are subject to the strictest scrutiny.

The foundation for state regulation of marriage was established in *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888): "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." This insight led Justice Powell, concurring in *Zablocki* v. *Redhail*, 434 U.S. 374, 399 (1978), to acknowledge that "[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."

In other words, even though marriage is a fundamental right, states may impinge upon this right to marry by prohibiting

marriage between certain categories of people based on nothing more than morality concerns alone. Judge Ferren's concurring/dissenting opinion in *Dean* v. *District of Columbia*, 653 A.2d 307 (D.C.App. 1995), makes the point well. Citing as an example the District of Columbia's law against "a man's marrying his son's wife or a woman marrying her stepfather," Judge Ferren (in a section of his opinion joined by the two other members of the D.C. Court of Appeals panel) pinpointed social morality as a self-sufficient basis for consanguinity laws that prohibit marriages among certain relatives even though their unions pose no dangers of biological inbreeding. "The consanguinity provision... reflects taboos – indeed moral judgments about improper marriage relationships – that transcend genetic concerns." 653 A.2d at 313.

The government's interest in promoting marriage laws that reflect and promote social morality is so strong that it even trumps a claim to marriage enhanced by a free exercise claim. Thus, in *Potter* v. *Murray City*, 760 F.2d 1065 (10th Cir.), *cert. denied* 474 U.S. 849 (1985), at issue was the First Amendment free exercise claim of a practitioner of "plural marriage" who challenged Utah's prohibition against polygamy. The Tenth Circuit duly noted that only a compelling state interest could overcome the free exercise claim, 760 F.2d at 1068-69; and that Utah had presented no empirical evidence that "monogamy is superior to polygamy." *Id. at 1069.* The court nonetheless rejected the First Amendment claim: "Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which

our culture is built. In light of these fundamental values, the State is justified, *by a compelling interest*, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship." *Id.* at 1070 (citation omitted; emphasis added).

What is so compelling about the right of government to legislate in these areas? The answer was well articulated by the English jurist Lord Patrick Devlin. Commenting generally on the role of morality in a society's laws, Devlin emphasized the enormous interests at stake:

> "If men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail if, having based on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society, and mankind, which needs society, must pay its price.
>
> . . . .
>
> "There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."

Devlin, *The Enforcement of Morals* (1965) at 10,13. See generally McConnell, *The Role of Democratic Politics in Transforming Moral Convictions Into Law*, 98 Yale L.J. 1201 (1989); Sandel,

Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 Calif. L.Rev. 521 (1989).

The position of the Petitioners and some of their supporting amici is that legislatures have no business passing laws regulating consensual sexual conduct and other matters of 'private morality'. But as many jurisprudential scholars have noted, the laws by which a society chooses to govern itself have, among other things, an *educative* function; they establish norms of conduct deemed acceptable by the society. As Justice Stevens noted in his *Bowers* dissent, statutes may have "a purely symbolic role," even if they are not actually enforced. 478 U.S. at 220 n.12 (Stevens, J., dissenting). We urge the Court not to devalue the importance of such symbolism in considering the constitutionality of laws like the one under challenge here.

Petitioners are also off mark in suggesting that the Texas law reflects nothing more than an animus against gay people. It reflects a considered determination by the legislature of Texas that the practice of homosexual sodomy – not the status of homosexual orientation – violates certain broadly held moral values regarding appropriate sexual conduct. Whatever the views of this Court, or public opinion in other states, or in the nation as a whole, as to the morality or immorality of homosexual sodomy, it is simply beyond the role of the judiciary to usurp the legislative role in making law – and making judgments about social morality upon which law is often based.

II.

A DECISION IN FAVOR OF PETITIONERS COULD HAVE FAR-REACHING LEGAL AND SOCIAL CONSEQUENCES

The narrow issue before the Court is whether states may enact laws prohibiting homosexual sodomy. But the broader issue may well be whether states may enact *any* law that reflects and is designed to promote broadly held views of public morality. That is because it will be difficult, if the Court finds the Texas law unconstitutional either on equal protection or on privacy grounds, and especially if the Court devalues the constitutional weight to be accorded the moral underpinnings of the law, to limit the logic of any such ruling to the specific context of homosexual sodomy. This genie, once let out of the bottle, will not easily be restrained.

Consider the argument that the Texas statute violates equal protection by discriminating against homosexuals who engage in sodomy but not heterosexuals who do the same. A similar argument can be – and has been[3] – used to attack marriage laws, which recognize marriage between a man and a woman but do not recognize same-sex unions. A decision by this Court that the Texas statute in question violates the Equal Protection Clause would thus give an enormous legal boost to the attempts now

[3] *See Baehr v. Miike*, 1996 WL 694235, Hawaii Cir.Ct.,1996, aff'd, 950 P.2d 1234 (S.Ct. Hawaii 1997); *Baker v. State*, 744 A.2d 864 (S.Ct. Vt.1999).

being made through the courts in many states to radically revise the longstanding definition of marriage – and invalidate the marriage laws that currently prevail in each of the 50 states – by recognizing same-sex marriages.[4] It is but a very short step from constitutional protection of homosexual activity to constitutional redefinition of marriage.

Or consider the broader implications of Petitioners' privacy arguments. If the Court revisits its earlier holding in *Bowers* and now concludes that homosexual sodomy between consenting adults is a fundamental right akin to the right to contraception and abortion, and/or that the state's morality based

---

[4] *Goodridge v. Department of Public Health*, 14 Mass. L. Rptr. 591 (Mass. Super. 2002), is set for oral argument before the Supreme Judicial Court of Massachusetts next month. Other cases are pending in other states. These cases, which center on the argument that equal protection requires that same-sex couples not be denied the status or legal benefits of marriage that are available to opposite-sex couples, appear to be part of a concerted national campaign by homosexual activists to win judicial recognition of same-sex marriage. As the *Detroit News* recently reported,

> In 1993, Hawaii's top court shook the world by seriously considering legally uniting two words rarely heard together before then: "gay" and "marriage." Now, ten years later, the Netherlands and Belgium embrace gay marriage. And this summer Massachusetts' top court could deliver the breakthrough for American gay couples that skittish Hawaiian voters ultimately thwarted.
>
> "We're in another Hawaii moment right now," stresses Evan Wolfson of the Freedom to Marry Collaborative. "Just a decade ago, gay marriage seemed almost unimaginable. Now the question is when, not if." (Deb Price, *Detroit News*, February 10, 2003).

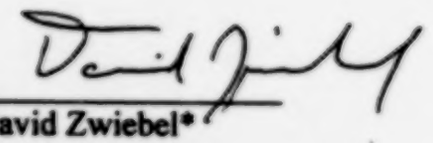
interests are insufficient to justify the Texas law, then it would appear that *any* private sexual activity between consenting adults should by definition be beyond the reach of the law. If a legislature may not impinge upon homosexual activity because it is private and consensual, it will not be long before laws that prohibit prostitution, adultery, bigamy, incest, consanguineous marriages, and other such restrictions on consensual sexual activity come under renewed attack.

To overturn the Texas statute on the grounds that it oversteps the constitutional limits of legislative power would be to invite legal challenges against any if not all such laws whose underpinnings are morality-based. Let those who oppose such laws convince legislative bodies that the moral consensus once thought to underlie the laws no longer exists – much as they have by now convinced the majority of state legislatures in the country to repeal their anti-sodomy statutes. But do not "solve the problem" by judicially depriving those legislatures of the ability to pass legislation in the area of morality generally, and sexual morality specifically, altogether.

CONCLUSION

Justice Harlan once stated: "To attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting). Amicus curiae Agudath Israel of America respectfully urges that this case not be used to withdraw morality-based matters from community concern. The decision below should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of February, 2003.



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No. 02-102

In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRONE GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Texas, Fourteenth District

BRIEF OF *AMICI CURIAE* TEXAS LEGISLATORS, REPRESENTATIVE WARREN CHISUM, ET AL., IN SUPPORT OF RESPONDENT

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Senator Craig Estes;
Senator Mike Jackson;
Senator John Lindsay;
and Senator Florence Shapiro.

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INTEREST OF *AMICI CURIAE*[1]

Amici are Texas Senators and Representatives who represent the people of Texas. *Amici* believe this case is about the right of the people and their duly elected representatives to determine State policy regarding marriage, the family and sexual conduct outside of marriage. The variety of State laws and policies on this contentious issue, and the changing nature of these laws within the States is a sign of the health of our democratic republic.

Petitioners ask the Court to take this issue out of the public debate and discussion and determine for all States a deeply controversial public policy issue found nowhere in the Constitution. *Amici* believe this would be a serious mistake and would have implications far broader than the statute in this case. Because of *Amici*'s more complete understanding of the Texas laws and legislative history and *Amici*'s understanding of additional State interests to support the challenged law, *Amici* believe their brief will be of assistance to the Court.

SUMMARY OF ARGUMENT

There is no evidence in the record to support petitioners' claims. There is no evidence as to whether the anal sex was non-consensual or consensual, private or in front of

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation and submission of this brief.

others, for pay or not, or by people too close in relation (incest). There is also no record of the sexual orientation of either of the men. The Court is being asked to issue an opinion based on hypothetical facts. Both claims should be dismissed as improvidently granted.

Petitioners seek a new "right of privacy" in sexual behavior, not the traditional right grounded in rights of marriage and procreation. There is no natural limitation to the new expansive right sought by petitioners. It is not deeply rooted in the nation's traditions and history and should be rejected.

Petitioners and their *amici* attempt to attach a badge of hatred to the Texas Legislature. Despite hours and hours of tapes of the hearings and testimony on TEX. PENAL CODE § 21.06 in the 1973 session and many subsequent sessions as well, not one single source of corroborating evidence from the vast legislative record is offered. Indeed, there are numerous rational bases supporting § 21.06, including the protection of public health and the promotion of marriage and procreation.

The act of homosexual sodomy reaps tremendous public health consequences, much more than heterosexual sodomy. Texas is certainly rational in attempting to discourage conduct leading to a lopsided proportion of the harm. Texas is also rational in promoting marriage and procreation and discouraging sexual conduct outside of marriage. Texas has a myriad of laws favoring marriage and discouraging sexual activity outside of marriage. Section 21.06 is one part of a system of laws including laws disfavoring adultery, banning polygamy and sex education requirements that sex outside of marriage, including homosexual sodomy, be discouraged. Promoting marriage and encouraging and funneling sexual activities

to within its bonds meets rational basis. Each of the arguments of petitioners, if accepted, would have serious implications for the marriage laws of every State.

Decisions regarding marriage, the family and appropriate sexual behavior should be left to the States, as they have been for over 200 years. The Court is being asked to inject itself into the middle of a fractious political debate, which petitioners themselves concede is changing in their favor in State after State. Taking the issue out of the public debate and discussion and determining for all States a deeply controversial public policy issue would be a serious mistake and would harm the Court and this nation.

ARGUMENT

I. PETITIONERS HAVE ESTABLISHED NO CONSTITUTIONAL VIOLATION.

Petitioners' entire case rests on the argument that consensual, private, non-commercial sex is protected by the Constitution and that petitioners were discriminated against because they are homosexuals. Yet, there is absolutely no record of any of the facts alleged by petitioners and their *amici*, save the following: two adult males – a 55-year-old white male (John Lawrence) and a 31-year-old black male (Tryon Garner) were found by police officers in the act of anal sodomy inside the apartment where Lawrence resides. Pet. App. 129a, 141a. The two probable cause affidavits, both authored by Officer Quinn, the only source of facts for the record in this case, read as follows:

> Officers dispatched to 794 Normandy #833 reference to a weapons disturbance. The reportee

> advised dispatch that a black male was going crazy in the apartment and he was armed with a gun.
>
> Officers met with the reportee who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

There is no evidence in the record that the anal intercourse was consensual, no evidence that it was non-commercial, no evidence of their degree of relation (incest) and no evidence that it was not done in the presence of other people. There is also no record of the sexual orientation of the men.

The dearth of facts in the record is especially troubling considering that "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Disputed factual issues drive constitutional decisions. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n. 5 (1986) ("[w]e have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication."). Factual records are essential to constitutional deliberation. *England v. Louisiana Bd. of Med. Exam'rs*, 375 U.S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims"). The lack of a factual record to support petitioners' claims is of great significance. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460, 2477 (2002) (O'Connor concurring) ("there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program"); *International Bd. of Teamsters, Chauffeurs, Warehousemen*

and Helpers Unions v. Denver Milk Producers, Inc., 334 U.S. 809 (1948) (per curiam) ("Because of the inadequacy of the record, we decline to decide the Constitutional issues involved."). Without a factual record supporting petitioners' claims, this Court would be forced to render an advisory opinion in a vacuum. The case should be dismissed as improvidently granted.

A. The record and law do not support a right of privacy claim.

1. The record.

Petitioners refer to "adults' private, consensual choices." Petitioners Brief at 9, *Lawrence* (No. 02-102). There is no record, however, that petitioners' sexual activity was done in private. It could have been done in front of other people. *See Lovisi v. Slayton*, 539 F.2d 349, 351-52 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1977) (even marital right of privacy is waived when an onlooker is welcomed). Petitioners also may have desired to be caught in order to create standing to challenge § 21.06.[2] Petitioners, in light of the absence of any facts in the record to support their claims, may only make a facial challenge. Under *United States v. Salerno*, a party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be

[2] It is rare indeed for an "anonymous" caller making a false report to conveniently wait for the police to show them directly to the room where the anal sex was occurring, knowing his identity and the false report would be discovered. These facts strongly suggest that the men engaging in anal sex desired to be "caught" by the police for the very purpose of challenging this law. It appears that petitioners' privacy argument lacks factual merit.

valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioners cannot meet this burden. For example, § 21.06 applies to non-consensual sodomy. *See, e.g., Torme v. State*, 525 S.W.2d 9 (1975). Would non-consensual sodomy be protected as a "right of privacy" of the perpetrator? Of course not. Likewise, the conduct could have been for pay, incestuous or in front of others. These applications of the law would make it constitutional under the *Salerno* standard. With such a sparse record, this case was either improvidently granted or should be summarily affirmed.

2. The law.

Additionally, even if a record had existed, the right of privacy is not absolute. States are not completely prohibited from regulating some aspects of intimate relationships. *See Carey v. Population Services Int'l*, 431 U.S. 678, 689 n. 5 (1977) ("we do not hold that State regulation must meet this standard 'whenever it implicates sexual freedom,' . . . or 'affect[s] adult sexual relations' "); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973) ("but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond State regulation, is a step we are unable to take"). As this Court noted in *Paris Adult Theatre I*, "State statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.' " *Id.* at 69 n. 15.[3] Bigamy involves consenting adults, intimate

[3] ("Consider also the language of this Court in *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964), as to adultery; *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916) as to fornication; *Hoke v. United*

(Continued on following page)

sexual relationships and privacy of the home, yet States are free to outlaw the practice. *See Davis v. Beason*, 133 U.S. 333, 344-45 (1890). If bodily integrity, intimate personal decisions and adult consent were ever wrapped up into a single right, it would be the right for a person to choose to end their own life. *See Compassion in Dying v. Washington*, 79 F.3d 790, 813-814 (9th Cir. 1996) ("Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy' "). Yet this Court specifically refused to acknowledge a fundamental right to die. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). There is, very simply, no fundamental right to engage in homosexual sodomy deeply rooted in our nation's traditions and history.

Petitioners attempt to wrap their claims in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Petitioners correctly quote *Eisenstadt* for the proposition that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person." *Eisenstadt*, 405 U.S. at 453; Petitioners' Brief at 12, *Lawrence* (02-102). However, petitioners fail to complete the quotation by including "as the decision whether to bear or beget a child." *Id.* The cases relied on by petitioners to support their "right of privacy" argument

States, 227 U.S. 308, 320-322 (1913), and *Caminetti v. United States*, 242 U.S. 470, 484-487, 491-492 (1917), as to 'white slavery;' *Murphy v. California*, 225 U.S. 623, 629 (1912), as to billiard halls; and the *Lottery Case*, 188 U.S. 321, 355-356 (1903), as to gambling").

revolve around a common theme of decisions regarding marriage, raising children and procreation. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000) ("fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (decisions regarding childbearing); *Carey*, 431 U.S. 678 (1977) (decisions regarding childbearing); *Roe v. Wade*, 410 U.S. 113 (1973) (decisions regarding childbearing); *Griswold*, 381 U.S. 479 (decisions regarding procreation within marital relationship); *Pierce v. Society of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (1925) (decisions regarding the upbringing and raising of children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (decisions regarding the upbringing and education of children). There is a certain cohesion among the decisions of this Court that compel petitioners to show something more than just an asserted right to do as one wishes.

Petitioners cite these cases while inviting the Court to ignore their holdings. Decisions regarding marriage and procreation receive special protection from this Court. Other individual choices among consenting adults do not, and it is no legal reason to change this law because petitioners theorize one generation is obtuse while the next becomes enlightened. Therefore, the decisions petitioners rely on should not be read in a vacuum but should be understood for what they really are; they represent not "a series of isolated points," but rather a group of rights protecting the rights of couples, whether married or unmarried, to choose when and how they will raise children, which is the most important decision for any society. *Casey*, 505 U.S. at 848.

There is precedent, of course, for a State to constitutionally criminalize private, consensual sodomy. *See Bowers*, 478 U.S. 186. Other examples of private, consensual, adult

activity that the State may prohibit include polygamy, bigamy, polyandry, the dissemination of obscene materials to willing buyers, the sale and possession of drugs, prostitution, gambling, suicide (including aiding another with suicide), and usury. *Reynolds v. United States*, 98 U.S. 145, 166 (1879) ("it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion"); *Miller v. California*, 413 U.S. 15, 18-19 (1973) ("[t]his Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material"); *Minnesota v. Martinson*, 256 U.S. 41, 45 (1921) ("[t]here can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs"); *L'Hote v. New Orleans*, 177 U.S. 587 (1900) (prostitution); *Ah Sin v. Wittman*, 198 U.S. 500, 505-506 (1905) ("suppression of gambling is concededly within the police powers of a State"); *Glucksberg*, 521 U.S. 702 (1997) (upholding Washington's anti-assisted suicide statute); *Vacco v. Quill*, 521 U.S. 793 (1997) (upholding New York's anti-assisted suicide statute); *Griffith v. Connecticut*, 218 U.S. 563, 569 (1910) ("It is elementary that the subject of the maximum amount to be charged by persons or corporations subject to the jurisdiction of a State for the use of money loaned within the jurisdiction of the State is one within the police power of such State.").

Petitioners ask this Court to overturn precedent and declare a new right never before recognized by this Court. This new "right" to sexual gratification would have no natural or principled limitation.

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but

> the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power to either forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting). Regulating the intimacy of the marital relationship and decisions regarding having and raising children "is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection." *Id.*

Petitioners come to this Court citing the same cases citied by the respondent in *Bowers v. Hardwick*.[4] The

[4] *Bowers*, 478 U.S. at 190 ("We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey v. Population Services International*, 431 U.S. 678, 685 (1977). *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were described as dealing with child rearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut, supra,* and *Eisenstadt v. Baird, supra,* with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process

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Court rejected the pertinence of those cases, holding "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Bowers*, 478 U.S. at 190-91. The only new argument Petitioners offer the Court is the perceived change in the prevailing winds of sentiment regarding homosexual activity among the various States. Petitioners are asking this Court to impose the will of the majority of States upon the minority, which is exactly what they complain of in this case.

B. The record and law do not support an equal protection claim.

Petitioners' equal protection claim is not supported in the record. There is no record that these two men were homosexuals. Without a record that the petitioners were homosexuals, they cannot fashion an equal protection claim that they are within the class they claim is discriminated against by § 21.06. Thus, they cannot support either a facial or an as-applied challenge. However, even if a facial challenge analysis were applied, § 21.06 applies whenever two members of the same sex, whether homosexual, heterosexual or bisexual, engage in "deviate sexual intercourse." Section 21.06, applied to two heterosexual men who engage in a one-time excursion into "deviate sexual intercourse" for experimentation purposes, does not discriminate against homosexuals. Petitioners simply have no record to back an equal protection claim and could not

Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey v. Population Services International, supra*, at 688-689").

meet the *Salerno* standard even if a claim existed. *See generally Salerno*, 481 U.S. 739.

Additionally, Petitioners' equal protection argument fails because "the statute is directed at certain conduct, not at a class of people." *Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985). Section 21.06 applies to individuals whether they are black or white, Asian or Hispanic, male or female, old or young. The law applies with equal application whether the individual is homosexual or heterosexual or bisexual or shifts between such categories from time to time. The law knows neither race nor sexual orientation.

Even if a valid equal protection claim had been brought, this case is not about a protected class such as race or gender. Sexual orientation is not a suspect class. *See Romer*, 517 U.S. at 632. The rational basis test applies, and § 21.06 easily satisfies rational basis.

II. SECTION 21.06 IS CLEARLY RATIONAL.

Section 21.06 easily satisfies the rational basis test. There are many rational bases supporting § 21.06. Interests in public health or the promotion of marriage would each alone satisfy the rational basis test.

A. Section 21.06 was not the product of animus.

Petitioners and *amici* supporting petitioners offer that the "***obvious*** explanation for § 21.06 is that it reflects popular disapproval of gay people." Brief of *Amici Curiae* Bruce A. Ackerman, et al. at 21, Lawrence v. Texas (No. 02-102) (emphasis added). This accusation is repeated throughout the *amici* supporting petitioners. Petitioners equate the motive for enacting § 21.06 to that of men who

"feared witches and burnt women." Petitioners' Brief at 37, *Lawrence* (No. 02-102). These accusations are outrageous. These charges are made, notwithstanding the availability of legislative history regarding the enactment of § 21.06 in the form of audiotapes of legislative committee hearings and debates. *See* Legislative Research Library of Texas, *Researching Legislative History and Intent, Step 4: Listen to tape recordings of legislative discussion.* <www.lrl.state.tx.us/legis/intent/intentStep4.html> (noting that recordings are available for legislation from 1973 onward). Petitioners' failure to cite this legislative history is telling.[5] Neither Respondent nor *Amici* can be expected to offer evidence to dispute a negative, especially one that does not exist. Petitioners' "purposeful avoidance of the truth" cannot serve as the justification for pinning a badge of hatred on the members of the Texas Legislature. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 692 (1989).

Petitioners' unsubstantiated claims of hatred by members of the Texas legislature are undoubtedly an attempt by petitioners to connect to dicta in this Court's opinion in *Romer v. Evans*, 517 U.S. 620, 632 (1996) in which Justice Kennedy in striking down a Colorado Amendment that limited the political access of gay and lesbian citizens to local government in Colorado observed, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."

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[5] Hours and hours of tapes of hearings and testimony on § 21.06 in the 1973 and subsequent legislative sessions exist and establish the legislative record. Petitioners have never introduced any of these tapes into the record or relied upon any of this vast legislative history.

Section 21.06, however, is clearly distinguishable. Unlike the Colorado amendment that struck at the very heart of the political process and therefore limited the ability of those subject to its terms to seek its repeal or reform, Petitioners like all Texas citizens remain free to argue for political change of the law. *Cf. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (amendment of city charter permissible under *Romer*). In fact, as Petitioners assert, some Texas citizens have sought repeal of this law. The fact that they have not won the political contest at this point in time does not make the law unconstitutional, nor evidence that the legislature is motivated by animus.

The fluid nature of political contests is well known to this Court. It is evidenced in the particular context relevant to this case by the passage of a hate crimes bill in the last session of the Texas Legislature that included "sexual preference" among the characteristics that invoked increased punishment. *See* House Bill 587, codified at TEX. PENAL CODE § 12.47.

Petitioners and their *amici* invite the Court to find animus on the part of the Texas Legislature as the necessary precursor to finding no rational reason for § 21.06 to exist. As Justice Kennedy pointed out, "[i]t is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws." *Board of Trustees v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). In this case, it is a charge made with no offer of evidence. More importantly, it is made with no foundation in truth.

B. Petitioners attempt to shirk their duty to negate all possible rational bases for § 21.06 by distracting the Court.

Petitioners are using the wrong standard. Under the rational basis test, it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (*quoting Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). Although there is no evidence that § 21.06 constitutes a legislative classification of persons, as opposed to acts, the rational basis test merely requires that such a classification be "rationally related to a legitimate governmental interest." *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). Petitioners bear the burden "to negative every conceivable basis which might support" § 21.06 "whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (internal citation omitted). The State of Texas "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 320; *see also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data").

Both the protection of public health and the promotion of marriage serve as rational bases to support § 21.06.

C. Section 21.06 is rationally related to protecting the public health.

Texas may legitimately exercise its police powers to protect the public health. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) ("Erie's efforts to protect public health and safety are clearly within the city's police

powers"). One of the rational bases for enacting § 21.06 was to protect the public health from the very real danger of same-sex sodomy.[6] Legislators are especially concerned for the health, safety and well-being of those who may seek to engage in same-sex sodomy. As *Amici* Texas Physicians Resource Council, et al. in their brief pointed out, "men who have sex with men, perhaps 2 percent of the U.S. population (*supra* note 12), account for 60 percent of Texas men with HIV/AIDS, 63 percent of the cumulative number of AIDS cases in U.S. men, and over 51 percent of all U.S. AIDS cases." Brief of *Amici Curiae* Texas Physicians Resource Council, et al. at 26, Lawrence v. Texas (No. 02-102); *See Texas HIV/STD Annual Report 2001*, 9 (Texas Dept. of Health Bureau of HIV & STD);[7] *CDC Basic Statistics*, Division of HIV/AIDS Prevention.[8]

Same-sex sodomy presents serious health problems that must be prevented in order to ensure that all of the people of the State of Texas, especially those that seek to engage in same-sex sodomy, are fully protected from ravages of infection and disease. According to the National

[6] Arguments that there is no legislative statement that § 21.06 was for the purpose of protecting public health misunderstand the law. There is no need for the Texas Legislature to produce legislative proclamations of intent and purpose. *See United States v. Lopez*, 514 U.S. 549, 617 (1995) (Breyer, J., dissenting) ("the matter that we review independently (*i.e.*, whether there is a 'rational basis') already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway."); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) ("no formal findings were made, which of course are not necessary"). In actuality, however, the Legislature has expressed the connection between § 21.06 and protection of public health. *See* TEX. HEALTH & SAFETY CODE § 85.007 (2002).

[7] Available at www.tdh.state.tx.us/hivstd/legislature/2001.pdf.

[8] Available at www.cdc.gov/hiv/stats.htm.

Center for HIV, STD and TB Prevention of the Centers for Disease Control and Prevention (CDC), Texas ranks fourth in the nation for the number of cumulative AIDS cases with 56,730 cases. *See CDC Basic Statistics*. With 368,971 AIDS cases being the direct result of same-sex sodomy between men and only 32,735 AIDS cases being the direct result of heterosexual contact, there is no doubt that it is rational to ban same-sex sodomy. *See id.* Same-sex sodomy accounts for more than ten times the amount of AIDS infections than opposite-sex activity. And this is just one sexually transmitted disease. The interests presented above alone, in addition to those presented by *Amici Curiae* Texas Physicians Resource Council, et al., more than meet the requirements for § 21.06 to be rational.

D. Section 21.06 is rationally related to promoting marriage and procreation.

Section 21.06 also satisfies rational basis as part of a myriad of laws enacted by the Texas Legislature to encourage marriage and discourage sexual activity outside of marriage. Second, even if § 21.06 were considered apart from all other Texas laws, it still serves the same interest of promoting marriage since the only sodomy prohibited is that which cannot be within and can never lead to marriage. Third, even if § 21.06 did not perfectly track the marital/non-marital distinction, it is not necessary to do so to pass the rational basis test. Finally, petitioners' arguments of discrimination would apply equally to heterosexual marriage, rendering the marriage laws of all fifty States unconstitutional.

1. Promoting marriage is important

The promotion of marriage is important to Texas. The Texas Legislature, expressing itself through the Family Code, stated that it created the statutory rules to establish marriage in order "to promote the public health and welfare and to provide the necessary records." TEX. FAM. CODE § 1.101. The highest courts[9] in Texas have likewise long affirmed that Texas has a public policy favoring marriage. *City of Sherman v. Henry*, 928 S.W.2d 464, 470 (Tex. 1996); *Texas Employers Insurance Association v. Elder*, 282 S.W.2d 371, 373 (Tex. 1955); *Roberts v. Roberts*, 192 S.W.2d 774, 776 (Tex. 1946); *Moore v. Moore*, 22 Tex. 237, 238-40 (1858); *Waldrop v. State*, 41 Tex. Crim. 194, 198 (1899); *Holder v. State*, 35 Tex. Crim. 19, 24 (1895).

The Texas Legislature promotes marriage because it provides numerous benefits to the State and its people. Married individuals are more likely than unmarried individuals to enjoy "very good" or "excellent" mental and emotional health. *See* Corey L. M. Keyes, *The Mental Health Continuum: From Languishing to Flourishing Life*, 43 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR, 207-22 (2002). In one study done over a period of thirty years, marriage had a substantial effect on the overall physical health of the population, which led to a direct and measurable benefit of reduced use of health facilities. *See* P. M. Prior & B. C. Hayes, *Marital Status and Bed Occupancy in Health and Social Care Facilities in the United Kingdom*, 115 PUBLIC HEALTH, 401-06 (2001). Married individuals

[9] Texas has two equal but parallel high courts. The Texas Supreme Court is the highest state court of appeal for civil matters. The Texas Court of Criminal Appeals is the highest state court of appeals for criminal matters.

have better health in all categories of health across the board. *See* Amy Mehraban Pienta, Mark D. Hayward & Kristi Rahrig Jenkins, *Health Consequences of Marriage for the Retirement Years*, 21 JOURNAL OF FAMILY ISSUES No. 5, 559-86 (July, 2000). Thus, marriage has a significant impact on the cost of health care and health related services. These savings translate into lower health insurance premiums, making health care available to those that could not otherwise afford health insurance and enabling the State of Texas to provide for the medical care of the poor.

Marriage creates more stability in the work force as married men are less likely to be terminated involuntarily or leave a job without having another job in hand. *See* Elizabeth H. Gorman, *Bringing Home the Bacon: Marital Allocation of Income-Earned Responsibility, Job Shifts, and Men's Wages*, 61 JOURNAL OF MARRIAGE AND THE FAMILY, 110-22 (1999). In fact, becoming married almost doubles the probability of moving from a poor to a non-poor neighborhood. *See* Scott J. South & Kyle D. Crowder, *Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences*, 102 AMERICAN JOURNAL OF SOCIOLOGY, 1040-84 (1997) (The study looked at thirty years of data from 17,000 inner-city households). There is a direct link between marriage and economic prosperity. Promoting marriage is important to the overall fight to end poverty. Marriage is a component to increasing economic prosperity, which in turn leads to an increase in overall health. *See* Catherine E. Ross & Chloe E. Bird, *Sex, Stratification and Health Lifestyle: Consequences for Men's and Women's Perceived Health*, 35 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR, 161-78 (1994). Promoting marriage impacts so many other aspects of social well-being that its benefits cannot be denied. It is, therefore, imperative that the Texas Legislature be free to promote marriage and

discourage sexual activity outside of marriage so that the Legislature may maintain its strongest weapon against poverty and deteriorating health.

2. Section 21.06 is part of a myriad of state laws promoting marriage and discouraging sexual activity outside of it.

In evaluating whether § 21.06 is rational, the Court should consider that the provision is one part of a larger network of laws designed to further the legitimate State interest of promoting traditional marriage of one man and one woman.

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Poe, 367 U.S. at 546 (Harlan, J., dissenting). The connection between § 21.06 and marriage is undeniable. **The same legislature which changed the Texas sodomy law in 1973 to its current form, at the same time changed Texas' marriage law to *explicitly* specify, for the first time, that marriage in Texas may only be between "a man and a woman."** TEX. FAM. CODE § 2.001 (Acts 1973, 63rd Leg., p. 1596, ch. 577, § 1). Even in teaching sexual education, Texas law emphasizes that sex should be within marriage and other conduct, such as homosexual sex, is discouraged. Sex education materials must "emphasize sexual abstinence before marriage and

fidelity in marriage as the expected standard" and must discourage "homosexual conduct" and note that it violates § 21.06. TEX. HEALTH & SAFETY CODE § 85.007.

Texas provides benefits to married couples that it does not provide to other "couples." Spouses have the right to consortium, the right to "affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage." *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978). Spouses may sue third parties in tort for the negligent or intentional impairment (such as through death or personal injury) of second spouse's consortium. *Id.* Spouses also have rights to support from one another. TEX. FAM. CODE § 2.501. A spouse who breaches this duty can be liable to third parties for necessaries purchased by the wronged spouse. *Id.* Spouses likewise have mutual rights to "services," meaning the performance by a spouse of household and domestic duties. *Whittlesey*, 572 S.W.2d at 666 n. 3. A spouse can recover in tort against a third party for the impairment (such as through death or personal injury) of the second spouse's ability to perform services. *Id.*

Another benefit of marriage not provided to other "couples" involves special property rights. Texas is a community property State. TEX. FAM. CODE § 3.002. Texas views the partners to a marriage as a community. Property acquired from the labor of either spouse during the marriage is generally viewed as property of the community, not the individual spouse. If a spouse dies intestate, the surviving spouse inherits at least some, and perhaps all (depending on whether other survivors exist), of the decedent's interests in community and separate property. TEX. PROBATE CODE §§ 43 and 45. Both spouses have right to joint management and control of ordinary community

property. TEX. FAM. CODE § 3.102. A spouse who controls special community property (community property under the sole control of one spouse) owes fiduciary duties to the other spouse to use the property for the benefit of the community. *Schlueter v. Schlueter*, 975 S.W.2d 584, 588 (Tex. 1998); *Mazique v. Mazique*, 742 S.W.2d 805, 807-08 (Tex. App. – Houston [1st] 1987, no writ). Unmarried "couples" do not have access to this community property system. Texas does not recognize a community in other relationships.

Texas has also created a zone of privacy within marriage that does not apply to other intimate relationships. For example, the Texas Rules of Evidence provide evidentiary privileges to spouses. TEX. RULES OF EVID. 504. One privilege permits spouses to refuse to disclose confidential communications from the second spouse. TEX. R. EVID. 504(a). A second and broader privilege permits a spouse immunity from testifying against the second spouse in a criminal case – whether about confidential communications or otherwise. TEX. R. EVID. 504(b). The Texas Supreme Court has explained that these privileges are "to promote and encourage the utmost confidence between husband and wife and thus to aid in the preservation of the marriage status." *Fasken v. Fasken*, 260 S.W. 701, 703 (Tex. 1924); *see also Ludwig v. State*, 931 S.W.2d 239, 242-43 (Tex. Crim. App. 1996). The policy of the law in Texas favors marriage and not other sexual behavior, however intimate or long-standing.

Texas also encourages marriage[10] by prohibiting or penalizing extra-marital sexual conduct. Some private, consensual sexual acts are criminal. *See* TEX. PENAL CODE §§ 25.01, 25.02, 21.06 and 43.02. In addition to criminalizing some sexual conduct, Texas legally penalizes other extra-marital sexual acts. Adultery, for example, while not criminal, is a ground that makes the adulterer at fault for divorce. TEX. FAM. CODE § 6.003. Even though Texas does allow no-fault divorces, Texas provides that a finding of fault is relevant to dividing the marital estate. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *Young v. Young*, 609 S.W.2d 758 (Tex. 1980). The trier of fact may rightly reduce the award of the party at fault. Similarly, Texas recognizes that when a spouse uses community property to fund adulterous affairs, the second spouse has a claim for fraud on the community, which affects the division of the estate in favor of the wronged spouse. *Mazique*, 742 S.W.2d at 807-808.

Even the Texas Constitution and common law support the legislative goal of funneling sexual activity into the bonds of marriage and disfavoring sex outside of marriage. In *City of Sherman v. Henry*, 928 S.W.2d 464, 470 (Tex. 1998), the Texas Supreme Court refused to extend the

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[10] Texas law limits marriage to one man and one woman. TEX. FAM. CODE § 2.001; *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. – San Antonio 1999, pet. denied), *cert. denied*, 531 U.S. 872 (2000). To enforce this arrangement, Texas does not legally recognize other arrangements (some of which may be recognized in other countries or jurisdictions), such as polygamy, incest, polyandry, bigamy, homosexual unions, and marriages of parties under the age of 14. TEX. FAM. CODE §§ 2.001, 2.003, 6.201 and 6.202. These non-traditional marital structures are so disfavored that many bring criminal liability. TEX. PENAL CODE §§ 21.11, 25.01, 25.02 and 43.21.

State right of privacy to sexual conduct outside of marriage, even though other jurisdictions had done so. Texas law thus recognizes sex within marriage as a special protected status, while disfavoring sex outside of marriage.

The argument that § 21.06 treats homosexual and heterosexual sodomy differently misses the mark. Whether viewing the Texas law against polygamy, sex education requirements that sex outside of marriage be discouraged, laws disfavoring adultery, or the prohibition of § 21.06, all these laws serve the interest of promoting marriage and discouraging sex outside of it.[11]

Even if § 21.06 were divorced from the other Texas law and viewed in a myopic fashion, it would still serve the same interest. Section 21.06 specifically prohibits the only sodomy which cannot be within and can never lead to marriage. Additionally, "a statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen v. Ward*, 279 U.S. 337, 339 (1929).[12] Promoting marriage and encouraging

[11] Petitioners' heterosexual/homosexual discrimination argument, if accepted, would equally strike down Texas laws discouraging adultery, since only those in heterosexual relationships are adversely affected.

[12] Moreover, under the rational basis test, "a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (*per curiam*) (*quoting Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). This Court has chosen "not [to] inquire whether [a] statute is wise or desirable.... Misguided laws may nonetheless be constitutional." *James v. Strange*, 407 U.S. 128, 133 (1972). The obvious reason for such a position by the Court is that

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and funneling sexual activities to within its bonds, easily satisfy the rational basis requirement.

The arguments of petitioners – (1) that a law which states a man and woman can engage in activity that a man and man cannot is discriminatory and unconstitutional, and (2) that fundamental rights status attaches to homosexual sodomy – directly implicate marriage. If (1) is true, the marriage laws of every State also so discriminate. If (2) is true, each State would be required to justify, under strict scrutiny, all its laws favoring heterosexual marriage. Such a determination would even implicate federal laws and regulations from the Department of Defense's "don't ask, don't tell" to Social Security and immigration laws and all other federal and State laws that assume a basic definition of marriage as heterosexual.

It is wise to leave the core area of the family to the States. As this Court has stated, "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Decisions regarding marriage, the family and appropriate sexual behavior should at least be the subject of public debate and discourse, as it has for the past 200 years, decided by duly elected bodies, and the 281,421,906 Americans they represent, not decided behind closed doors by courts.

"[r]ational-basis review – with its presumptions favoring constitutionality – is a paradigm of *judicial* restraint." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S 356, 383 (2001) (Breyer, J., dissenting) (internal citation omitted) (emphasis in original).

III. JUDICIAL INTERVENTION INTO CONTESTED POLITICAL QUESTIONS DISRUPTS THE PROPER POLITICAL STRUCTURE AND HARMS THE NATION.

The Constitution embodies a delicately balanced power structure, both horizontally and vertically. Horizontally, the separation of powers confers on each branch the means "to resist encroachments of the others." THE FEDERALIST NO. 51, at 349 (J. Madison) (J. Cooke ed., 1961). Vertically, principles of federalism require special attention when the Court is put in the position of piercing the silence of the record with its own "findings of fact," especially when those "facts" can be based only on the bare assertions of petitioners and their *amici* without support in the record. A factual record, missing in this case, is essential.

Petitioners rely heavily on the fact that many States have repealed their sodomy and fornication laws. *See* Petitioners' Brief at 24, *Lawrence* (No. 02-102). According to petitioners, the Texas legislature is out of step with the legislatures of other States and must be forced by this Court to bend to the will of the majority of States. This is akin to asking the Court to control the conduct of one State at the behest of another. *See New York v. New Jersey*, 256 U.S. 296 (1921) (the Court at least required clear and convincing evidence before exercising its power to control the conduct of one State at the behest of another in an effort to promote federalism); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) ("The Framers, however, did not make the judiciary the overseer of our government").

This case has vast and far-reaching implications that go beyond the decision regarding the present case. A

decision in favor of petitioners will bring into question the ability of the states to regulate sexual conduct and define marriage as the union of one man and one woman. Such a decision would arguably affect our communal lives more than any other issue the States will face in the foreseeable future. It will also "invite [ ] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985). At the same time, it will "relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy."[13] *Garcia*, supra, 469 U.S. at 575 (Powell, J., dissenting) (footnote omitted).

The Louisiana Supreme Court, confronted with the constitutionality of its sodomy law, issued a warning concerning judicial restraint:

> [O]ur constitution is not [to] be subject to judicial amendment to express whatever a majority of this court happens to conclude at any given time is the more enlightened viewpoint on a particular controversial issue. If our constitution can be judicially amended in such a manner, that constitutes government by this court, rather than government through a constitutional system of which this court is a separate and equal branch. To hold otherwise would be to allow any and all

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[13] "If the several States in the Union are to become one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Samuel Adams, Letter to Richard Henry Lee, 3 Dec. 1787, in The Writings of Samuel Adams 4:324 (Harry A. Cushing ed. 1968).

> disaffected groups . . . [to] only convince a majority of this court that what they seek is an implicit "right" afforded by the Louisiana Constitution. Our constitution wisely provides for separation of powers, and authorizes the legislature to make public policy determinations in this area.

State v. Smith, 766 So.2d 501, 510 (La. 2000).

Petitioners point out that some States have chosen to change their laws through the appropriate legislative process. Petitioners' attempt to accelerate their victories by having this Court impose the decisions of some States on the other States would destroy the debates and democratic discussions occurring State by State. It would do damage to our country's structure and misuse the role and power of the courts.

> Therefore, the only perceptible unconstitutionality in this case is that which would be evident if this court would determine, by acting as social engineers rather than jurists, and elevate our own personal notions of individual "liberty" over the collective wisdom of the voters' elected representatives' belief. That belief has already determined that a prescription on oral and anal sex, consensual or otherwise, is in furtherance of the moral welfare of the public mind. Social engineering is not a valid function of this court.

Id. at 510. "Judge-made constitutional law having little or no basis in the Constitution is dangerous and questions the legitimacy of the Court." *Id.* at 512.

Determining for all States such a controversial public policy issue found nowhere in the Constitution would be a mistake. This core area of marriage, the family and appropriate sexual behavior should be left to the States.

CONCLUSION

For the foregoing reasons, the Court should dismiss the writ as improvidently granted. In the alternative, the Court should affirm the judgment of the Court of Appeals of Texas.

Respectfully submitted,

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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals of Texas Fourteenth District

BRIEF OF *AMICI CURIAE*, PRO FAMILY LAW CENTER, TRADITIONAL VALUES COALITION, TRADITIONAL VALUES EDUCATION & LEGAL INSTITUTE & JAMES HARTLINE, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amicus Curiae, Pro-Family Law Center (PFLC), is a division of Abiding Truth Ministries, a non-profit corporation organized under the laws of the state of California. PFLC is dedicated to protecting marriage and the natural family and opposing the legitimization of homosexuality and related conduct in American society. It has been active in formulating and analyzing public policy related to homosexuality and in public advocacy of family values since its founding in 1999. PFLC director, Scott Douglas Lively, is an attorney licensed to practice law in the State of California and an internationally recognized expert on the topic of homosexuality in society. On behalf of PFLC, Mr. Lively has served as an advisor and consultant to family values activists and organizations globally, and has addressed conferences on these issues in the United States, Canada, Great Britain and East Africa.

Both attorneys from the UNITED STATES JUSTICE FOUNDATION have served as legal experts to the State of California's Legislature (hearings on civil unions). Counsel of Record has served as an academic expert to the Marriage Law Project of the Catholic University of America on same-sex relations.

Amicus Curiae, TRADITIONAL VALUES COALITION is the largest non-denominational, non-profit grassroots lobby in America representing churches and individuals. TVC has been present at the U.S. Congress for over 20 years advocating for pro-family issues including the right to the free exercise of religious liberties. TVC represents over 43,000 churches bridging racial and socio-economic barriers and includes most Christian denominations.

Amicus Curiae, TRADITIONAL VALUES EDUCATION & LEGAL INSTITUTE is a non-profit foundation dedicated to educating and assisting churches and individuals in their efforts to restore America's Judeo-Christian cultural heritage

and their right to the free exercise of their faith. TVCELI makes information and analysis available on public policy and current cultural issues.

Amicus Curiae, JAMES HARTLINE is an ex-homosexual living in San Diego, California. He is forty-four years old and has been HIV positive for over five years. He made the choice to leave homosexuality several years ago. Mr. Hartline contracted HIV/AIDS through living the lifestyle advocated by Petitioners. Indeed, he engaged in private, consensual, adult, homosexual activities for about twenty years. His lifestyle activities included sodomy with other consenting males. Mr. Hartline has dedicated himself to educating others about the dangers of the homosexual lifestyle, and humbly offers this Honorable Court his experience with homosexuality, and HIV/AIDS, in an effort to prevent the deaths of countless other human beings. He offers others the opportunity to learn from his personal testimony as to the ability and community obligation to make responsible choices with one's body. Mr. Hartline describes the lifestyle promoted by Petitioners as 'operating on a moral compass with the needle broken off.'

INTRODUCTION

There is no constitutional right for an individual to engage in oral or anal sodomy with any other person. This type of conduct is not implicit to any concept of ordered liberty, such that a violation of substantive Due Process principles can be found. It is not irrational discrimination, if done for the right reasons, to criminalize same-sex sodomy while allowing opposite-sex sodomy to remain legal. Petitioners' sexual liberation theories cannot trump the legitimate, compassionate, and necessary right of the individual states to prevent death and disease.

Petitioners have painted themselves as uncontrollable sexual beings who must be given the freedom, at all social and physical costs, to be able to place their male reproductive organs in the anus of another human being. [Pet. Brief at pp.

8-9, 11-16; ACLU at pp. 8-9]. Health consequences are not an easily perceived concern of Petitioners, or their supporters, as privacy and fulfillment of Dionysian self-interest are the ultimate moral ends by which they live, and expect all others to live by. [Pet. Brief at pp. 11-16].

Petitioners' apparent position, and many of their supporting *amici curiae*, is that all private sexual conduct, between consenting adults is 'off limits' to the government. [Pet. Brief 13 ¶ 3; ACLU at pp. 4-25]. Petitioners paint with too broad a brush. To Petitioners, privacy is ostensibly more important than giving the states the right to stop, now, or in the future, the spread of deadly disease or the soaring healthcare costs of HIV/AIDS care. Regardless of what Petitioners say, the privacy of one's home should not be used as a permissible breeding ground for dangerous behaviors.

The most telling reality of the 'no-holds-barred' approach of Petitioners recently came to the forefront of national news. The following statement, relating to a member of the class of homosexuals sought to be given Fourteenth Amendment acknowledgment here, illuminates the reasonable fears of *Amici Curiae*:

> "Carlos is a part of an intricate underground world that has sprouted, driven almost completely by the Internet, in which men who want to be infected with HIV get together with those who are willing to infect them. The men who want the virus are called "bug chasers," and the men who freely give the virus to them are called "gift givers." [. . .] *HIV-infected semen is treated like liquid gold.* [. . .] [B]ug chasers will do anything to get the virus—to "get knocked up," to be "bred" or initiated into the brotherhood. [emphasis added]." Gregory A. Freeman, Bug Chasers: The Men Who Long to Be HIV+, *Rolling Stone* (February 6, 2003 at 44).

It must be recognized that the individual States have a right to extend compassion and responsibility toward the causes

and conduct associated with phenomena of the type described in Carlos' life. Carlos' behavioral choices, or those *potential* choices of Petitioners[1], and the social consequences resulting therefrom, are apparently not unique. See,

http://www.lildragn.com/flamearchive/000044.html;
http://www.wired.com/news/culture/0,1284,18244,00.html;
http://barebacksexinsf.com/dark.html;
http://www.adultgroupfinder.com/links/Gay_Male/more3.asp;
http://www.virusmyth.net/aids/data/cfunprotected.htm;
http://www.ironminds.com/impression/unprotected.shtml;
http://www.hivstopswithme.org/boston/troix/troix_email33.html;
http://www.poz.com/archive/february1999/inside/rideonthewild.html.

In fact, members of Petitioners' class of persons, in the State of Texas, offer the following:

> "No lectures, spamming, or saints trying to tell us what we're doing. We just want to meet and ram each other. If that's not what you want, this list isn't for you. No discussion of HIV issues. Take that up privately if you need to. http://www. adultgroupfinder.com/links/Gay_Male/more3.asp

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[1] The record does not indicate, one way or the other, whether Petitioners engage in what might be characterized by them as 'safe' sodomy. Without a sufficient record, one can only assume that Petitioners are arguing for a constitutionally-recognized right to engage in 'safe' and 'unsafe' sodomy, without State interference. The Texas statute is presumed valid, especially where speculation is apparent in the record. *See Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946)[showing of law's applicability or nonapplicability must be made]; *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976) [discriminatory statute may be non-discriminatory in its actual operation]. A party must demonstrate actual injury for standing to apply. *Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville, Florida*, 508 U.S. 656 (1993). Here, Petitioners have not demonstrated, as a matter of fact, that they are outside the reach of a legitimate or compelling state interest (i.e., unsafe sex). [See Petitioner's Statement of the Case].

It is odd that Petitioners would be so willing to overlook the fact that there are, obviously, conceivable instances where the Constitution rightfully provides the States with the power to assert moral authority to protect and regulate citizens. It is sad that Petitioners advocate a position that does not entail the least responsibility to enact and enforce any laws that prevent any potential "Carlos" from infecting himself, or others, with a deadly and financially costly disease. While one could concede that the desire to be a homosexual is not necessarily a proven "disease" [Pet. Brief p. 16], living the lifestyle of a homosexual can be, and often is, a cause of disease.

To the extent that *Bowers v. Hardwick*, 478 U.S. 186 (1986) provides the States with the power to care for their citizens, it must not be overruled. Indeed, it would be immoral for this Court to disregard the faces of a Nation suffering from the scourge of HIV/AIDS, human papilloma virus, and other devastating diseases in the interest of sanctifying sodomy as a jewel in the crown of Constitutional liberty. Sexual freedom is not more important than preventing unnecessary human suffering. However, Petitioners do not so allow mere mention of even one possible exception to the rule of sexual liberality they militantly propose. Neither 'con-sensuality,' nor privacy, are justifications for stripping the States of their Tenth Amendment rights.

Amici Curiae implore this Court to issue an opinion which recognizes that not all "consensual" sex between adults is immune from state regulation. As with pornography, obscenity, adult business regulation, prostitution, marriage, child-raising, and a host of other essentially private behaviors, the States have a legitimate right to regulate socially harmful behavior. This Court has an established history of recognizing that even private and consensual intimacy, between adults, can have consequences open to regulation.

While the State of Texas has been shockingly impotent in its attempts to extend compassion and responsibility toward the consequences of dangerous behaviors, this Court should

not shirk its responsibility to interpret the Constitution in a manner that recognizes that 'tough love' has a place in the ordinary regulation of even 'private' citizen behavior. Even AIDS activists at the University of California San Francisco seem to recognize the importance of bringing an effective end to conduct "that's capable of transmitting HIV . . .". http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.418e.

In assessing obligations to the Constitution, it does not matter that Petitioners have the strongest of desires, whether genetic or intentional, to place each other at the risk of contracting deadly diseases, in the Petitioners' ill-defined interest in 'privacy.' There is no authority that suggests that this Court is required to give a positive affirmation of every single facet of individual sexuality. Whether or not the etiology of homosexuality is genetic or social, homosexuals do have the freewill to avoid dangerous behavior, and the States have a legitimate interest in preventing the healthcare costs, social costs, and psychological costs of deadly behaviors, including consensual anal sex by and between heterosexual or homosexual adults. If this Court gives all members of the homosexual or heterosexual communities sexual carte blanche, it deprives them of the opportunity and obligation to be responsible to the individual States for irresponsible conduct. This should not be the intended course of a morally responsible Court.

While Petitioners strenuously compare themselves to the loving heterosexual families who have existed over the course of human history, this same history bears out the indisputable truth that monogamous marital/conjugal relationships do not ordinarily result in the transmission and spread of deadly diseases and other economically costly effects. One can readily see that there are members of the class of homosexuals who simply do not care about what they might do to each other, and whether or not the consequences of their behavior may give rise to the spread of disease and soaring healthcare costs. Indeed, the flippant attitude of certain

members of Petitioners' class is demonstrated by comments such as, "Our guys f–k and s-k without any barriers, lectures or bulls—t. [exact words edited]." See, http://www.bareback.com. There is no Constitutional right, whether framed by our Founding Fathers, or by this Court in the year 2003, to "f–k and s–k without any barriers." The record below does not distinguish Petitioners from those who act without "barriers," and Petitioners do not care that there is no reasonable claim that the Fourteenth Amendment provides free license for consensual sex of this nature.

As one can see from the *Rolling Stone* article and www.bareback.com, certain members of Petitioners' class (i.e., homosexuals) proudly demonstrate their unwillingness to acknowledge society's desire to be compassionate, and to preserve precious healthcare resources for those who have fallen, not because of preventable and irresponsible conduct, but because of the genetic conditions that cause heart disease, malignant cancers, Parkinson's disease, Lou Gehrig's disease, and so many other debilitating conditions. It seems impossible that any honest assessment of the United States Constitution could net a result that commands that privacy and sexual liberation be deemed premier interests which outweigh even the cries of America's terminally ill.

While Petitioners may deny, without an adequate appellate record, that they personally engage in completely irresponsible behaviors themselves[2], they must admit to the fact that members of the class of persons, known as 'homosexuals,' do have members that define themselves by their

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[2] The paucity of the record below does not disclose even basic facts such as whether Petitioners were in a continuing homosexual relationship, whether they were acting in a manner that invoked the State of Texas' legitimate police powers, or whether they actually qualified as members of the class of "homosexuals." All that is known is that they were caught in the act of certain conduct in a limited instance of time.

willingness to engage in *conduct*[3] that can kill. On the other hand, this Honorable Court has a moral obligation to bring the full force of the Constitution, and the responsible exercised power of the individual States, down upon dangerous conduct. Petitioners' position commands that this Court run from its apodeictic obligations.

On the other hand, as shown below, the conduct and proposed rights of Petitioners bear out unacceptable consequences to individuals, and society as a whole. While it may be very true that not all conduct of the Petitioners nets deleterious effects, certain of their admitted behaviors do pose notable risks to society. These risks need to be prevented. Such risks will not be prevented if this Court crafts a decision of the unfettered scope suggested by Petitioners and the army of *amici curiae* that have followed in their quest for unfettered sexual liberation in the face of mortal consequences and inequitable socio-economic costs.

Where individuals cannot control their own dangerous behaviors, the State must be able to respond accordingly. The greater public health consequences of same-sex sodomy provide a rational basis for discrimination against such conduct. *Bowers v. Hardwick* is good and necessary law to preserve the right of states to regulate socially irresponsible conduct.

This Court can be assured that any irresponsible decision, on its part, will be metastatic. Petitioners will not be content with only having gained the judicially-created right to engage in sodomy, they will seek same-sex marriage, affirmative action, and a host of other societal covenants that are not ordinarily occasioned by one's claimed genetic/adaptive

[3] *Amici Curiae* are not arguing that the State has legitimate interests in regulating a person's thoughts, temptations, moral beliefs about sexuality, or mere tendency to engage in irresponsible acts. Creating an environment where the States can regulate harmful conduct is the Constitutional promise sought to be obliged here.

inability to control sexual urges toward members of their own sex, or an inability to be socially responsible for the danger of placing one's reproductive organs in the anus of another human being.

I. PETITIONERS' EQUAL PROTECTION ARGUMENT IS FAULTY

Petitioners claim that Texas law is unlawfully discriminatory against homosexuals as a classification of persons. This position is not legally sound and should be rejected. To wit, Petitioners are claiming that homosexuals are unlawfully treated differently than 'traditional' couples under the law. This could be a completely true statement and there is no constitutional offense. Persons can be treated differently according to the conduct that they *choose* to engage in. If any person desiring to engage in sodomy can be said to have control over such an urge, then it is not unreasonable to hold them to account for the potential consequences of such behavior. If they claim the urge to be uncontrollable, society's interest in regulation is all the more accentuated. It hardly makes sense to await the development of critical mass in terms of a person contracting a deadly disease, spreading the disease, and the healthcare costs associated therewith.

In any event, the core purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). It was not intended "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly,* 113 U.S. 27, 3 (1884). In fact, it has been recognized that a State can rarely legislate without discriminating against one group or another. *Sullivan v. U.I.L.,* 616 S.W.2d 170, 172 (Tex. 1981).

By definition, the prohibition of one form of conduct, over another, results in discrimination against those who may or may not partake of the conduct so legislated. Prostitutes,

pedophiles, pederasts, purveyors of obscenity, irresponsible heterosexuals, and irresponsible homosexuals all deserve to be held to account for foolish behavior. Here, the record does not disclose whether Petitioners are responsible. The record does not disclose whether the State of Texas had a legitimate right to interfere with the conduct of the Petitioners. Unfortunately, the State of Texas has been forced to defend what may be a good law in the face of a questionable record. As pointed out in the Brief of the Institute for Justice, at pp. 26-28, it is impossible to analyze whether or not the Texas statute is rationally related to its goals.

This is because one cannot tell from the record below, whether or not Petitioners were engaged in behavior beyond the reach of the government, as opposed to conduct such as "bug chasing," which would be sanctionable. This Court has been placed in the tenuous position of having to consider a decision, that may have broad societal impact, with no sense of whether the parties even meet the epistemic challenge of rising to the call of the stated principles they expect to be sanctified by this Court. Whether Texas has a legitimate state interest can only be determined in a well-defined context. Such definition is clearly lacking in this case. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) [regarding the judicial need to be able to draw connections between facts and law].

In order to complain of the unconstitutionality of a statute, one must show that one is a member of a class discriminated against by the statute. *See Tileston v. Ullman*, 318 U.S. 44 (1943); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979). Here, the record discloses only a single instance of homosexual conduct occasioned by State prosecution. If it is that Messrs. Lawrence and Gardener were merely experimenting with their sexuality, one would be loathe to necessarily identify them as homosexuals per se'. If it is that the conduct of Petitioners defines their constitutional status, then Section 21.06's criminal applicability is not contingent on

one's sexual identity, and only addresses what may be dangerous conduct.

Giving every benefit of the doubt to Petitioners, the Court has, at no time, recognized homosexuals or other participants in sexually-defined conduct as protected classes for Equal Protection purposes. In *Board of Education of Oklahoma City v. National Gay Task Force*, 729 F.2d 1270, 1273, aff'd. 470 U.S. 903 (1985), the court affirmed the ruling of the 10th Circuit Court on this point, saying "We cannot find that a classification based upon the choice of sexual partners is suspect." It has also addressed the issue in the negative by denying review of lower decisions finding no such protection. *See, Rowland v. Mad River Local School District,* 730 F.2d 444 (6th Cir. 1984), rehearing denied 470 U.S. 1009 (1985). A denial of review is no less appropriate in this case. There is no confusion in the laws as suggested by Petitioners. (Petitioners' Brief at p. 9).

Petitioners are attempting to force this country to condone homosexual relationships and to create a universal right, based on these relationships, which has never been recognized in the Constitutional history of the United States. See, *Jantz v. Muci,* 976 F.2d 623 at 624 (10th Cir. 1992), *cert. den.*, 508 U.S. 952 (1993) (re discrimination against job applicants and declaring no precedent to support protected class).

As noted in Justice Burger's concurring opinion in *Bowers v. Hardwick, supra.*, "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization [cites] . . . This is essentially not a question of personal "preferences" but rather of the legislative authority of the State." *Id.* at 196, 197.

II. HOMOSEXUALS ARE NOT A DISADVANTAGED CLASS FOR PURPOSES OF EQUAL PROTECTION ANALYSIS

Petitioners and their supporters argue that many lesbians, gays, and bisexuals have suffered longstanding social and economic discrimination. These groups of persons are portrayed as disadvantaged groups.

The portrayals by Petitioners are misleading and contrary to established law. In real terms, "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no recognizable roots in the language or design of the Constitution." *Bowers* at 478 U.S. 195. Here, as shown in the Introduction, above, this Court is now being asked to recognize, and align itself, with a class of persons who are defined by their tendency or willingness to engage in certain behaviors, including sodomy. Within that same class are persons who wantonly act towards spreading and receiving AIDS. This Court's acceptance of a sexual 'free-for-all,' veiled in an emotional appeal to some 'loving relationships,' is not going to assist it in maintaining the legitimacy acknowledged by Justice White in *Bowers*, a decision that was joined by Justices Burger, Powell, Rehnquist, and O'Connor, less than twenty years ago.

To establish a suspect/disadvantaged class, for purposes of the law, it must be shown that the plaintiff is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973). Moreover, the "immutability" of the plaintiff's characteristics is a factor to be considered. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

This Honorable Court has only recognized five separate classes as qualifying for strict scrutiny review in the face of discriminatory actions by a state. Homosexuality is not one

of these classes. Indeed, "The Supreme Court, however, has never held that homosexuals are a suspect class. Likewise, lower courts have also refused to classify homosexuals as a suspect class. Therefore, courts have not used a suspect class analysis to apply strict scrutiny to procedural burdens on homosexual rights legislation." Seth Hilton, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?* 28 U.C. DAVIS L. REV. 445, 453 (1995).

In fact, "The Supreme Court has identified several factors for determining whether a particular class of people constitute a suspect class. Class members must have an immutable characteristic, be politically powerless, and have suffered from a history of discrimination. Homosexuality usually fails this test by failing to establish an immutable characteristic. When analyzing immutability, most have considered homosexuality strictly an issue of conduct that does not involve any irrepressible internal identification and understandings of self. In addition to the inability to clear the immutability hurdle, homosexuals have also experienced difficulty satisfying the politically powerless prong of the suspect class test. As a result of these problems, the Supreme Court has refused to declare homosexuals a suspect class." Gary Alan Colis, *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. . . REV. 991, 995 (1997) [citing Hilton, *Id.*]. *See also, Gay Inmates of Shelby County Jail v. Barksdale*, No. 84-5666 (6th Cir. June 1, 1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984); *State v. Walsh*, 713 S.W.2d 508, 511, 55 USLW 2070 (Mo. 1986); *In re Opinion of the Justices*, 129 N.H. 290, 295, 530 A.2d 21, 24 (1987); *Gay and Lesbian Students Ass'n v. Gohn*, 656 F.Supp. 1045, 1057 (W.D. Ark. 1987).

In applying the above critical analyses, the recognized "suspect" classes are: "Race," *Loving v. Virginia*, 388 U.S. 1, 11, 875 (1967), "Alienage," *Graham v. Richardson*, 403 U.S. 365, 372 (1971), and, "National Origin," *Korematsu v.*

United States, 323 U.S. 214, 216, 65 S.Ct. 193 (1944). The recognized quasi-suspect classes are: "Gender," *Frontiero, supra*, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724 (1982), and, "Illegitimate Children," *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).[4] There is a general policy against extending the protections of a 'suspect class status' to other groups. *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996); *High Tech Gays*, 895 F.2d at 571-72 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U. S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U. S. 1035 (1986).

There is a remarkable factual consistency in the above classes. Each recognized class possesses characteristics that are indeed "immutable," or virtually permanent. Simply, a person does not need to "come out of the closet" to have it known that he or she is a member of some suspect class. A mere inquiry into the person's birth circumstances reveals the person's membership status. Being a member of any one of these classes does not expose one to diseases, a shortened life span per se,' or any of the other conditions that accompany the decision to 'live out' one's homosexuality. *See, Sodomy: A Public Health Risk*, Family Policy Network, http://www.familypolicy.net/policy/sodomy-consequences. shtml. *See also*, The Washington Times, http://dynamic.washtimes.com/twt-print.cfm?ArticleID=20030212.

An additional consideration for the court is the potential for abuse that exists in the creation of a suspect class which cannot be determined by objective criteria. For example, if homosexuality or "sexual orientation" were to become equivalent to race in hiring or admissions policies, non-homosexual persons could, with impunity, claim to be homosexual to

[4] See also, http://www.family.org/cforum/research/papers/a0002964.html

qualify for more favorable treatment. This consequence is especially likely in, but not exclusive to, organizations such as schools and colleges that are increasingly concerned with reflecting "diversity" in their populations. This makes a mockery of the legitimate civil rights movement.

Further abuse is likely if homosexual activists discover that they can gain greater political power for their movement by stacking a diversity-minded organization with "in-the-closet" members in addition to the "out-of-the-closet" ones. Conceivably, the population of an organization could be made up entirely of homosexuals with only 2-3% being out of the closet. The organization would thus appear to reflect the percentage of homosexuals in the general public, yet be entirely in the political control of "gay" activists. Obviously this special capability of homosexuals would disadvantage racial and other minorities whose defining characteristics are easily observable.

Leading strategists of the homosexual political movement have acknowledged that homosexuality is not immutable. The following is quoted from *The Advocate*, the magazine-of-record of the homosexual movement.

"There is this dichotomization problem," concurs Pat Cain, a professor of law at the University of Iowa Law School who serves on the board of directors of Lambda Legal Defense and Education Fund, a gay group. "You're male or you're female, you're black or you're white, you're gay or you're straight—and of course we know that's not true". . . ."There are a lot of lesbians coming out of the women's movement who are into freedom of choice and have experienced their own decision to become a lesbian as a free choice and as one they continue to affirm: 'I am proud to be a lesbian, I choose it, I affirm it, and you don't have to feel sorry for me—I wasn't born this way.'" *See* Masha Gessen and David McGowan, *Raiders of the Gay Gene*, THE ADVOCATE, (March 24, 1992).

Dutch homosexual researcher Herman Meijer, in a paper published in the *Journal of Homosexuality* asked the scientific question, "Can Seduction Make Straight Men Gay?."

"Can a man whose past sexual practice has been almost exclusively heterosexual change his practice to homosexual after being seduced by another man? To those who believe that homosexual preference is homosexual *orientation*, an innate biological predisposition, the answer is a resounding 'no.' Contrary to this response, the author presents three cases in which the men switched from heterosexual to homosexual relationships (exclusively in two cases) by means of a sexual encounter initiated by another man. . . . The evidence that these men experienced a genuine change in sexual preference, shows that life-long, exclusive homosexuality, as articulated by gay rhetoric, is more a statement about the culture in which it occurs than the 'essence' of homosexuality." [Emphasis in original] [from John P. De Cecco, John P. Elia, *If You Seduce a Straight Person, Can You Make Them Gay?*, Issues in Biological Essentialism Versus Social Constructionism in Gay and Lesbian Identities, originally published as *Journal of Homosexuality*, Hayworth Press, Volume 24, Number 3/4 (1993)].

Award-winning "gay" author Lillian Faderman admits that the claim of immutability is made in bad faith by homosexual activists. "The concept of gay and lesbian identity may be nothing but a societal construct, but it has been crucial, enabling us to become a political movement and demand the rights that are due us as a minority. What becomes of our political movement if we openly acknowledge that sexuality is flexible and fluid, that *gay and lesbian* does not signify 'a people' but rather a 'sometime behavior'?" [Emphasis in original] [*See*, Lillian Fademan, *A Bisexual Moment*, THE ADVOCATE (September 5, 1993)].

One's race, national origin, sex, alienage, and illegitimate status are all based on biological, or identifiable geographical factors, beyond the control of the class member. Once the

member has taken on one of these statuses through birth, the status cannot be changed. However, the only way that one can be identified as a homosexual is through voluntary verbal or physical conduct which alerts another person of the sexual status. Simply, a homosexual must somehow, fail to keep his or her status, or relationships flowing therefrom, private. They must breach their own "right of privacy."

While Petitioners argue that the ban on same-sex sodomy is a form of gender discrimination, this argument has been expressly rejected time and again. The laws against gender discrimination arise exclusively out of the fact that women were treated as being inferior to men. The oppression caused by this 'labeling' gave rise to a need to enact protective laws. *Reed v. Reed* 404 U.S. 71 (1971); *Phillips v. Marietta Corp.* 400 U.S. 542 (1971). As demonstrated below, Petitioners' position does heavy damage to the progress made by women and racial minorities during the historical development of this Nation.

Finally, as to whether homosexuals are "politically powerless," the Ninth Circuit Court in *High Tech Gays* correctly pronounced that "homosexuals are not without political power, they have the ability to and do 'attract the attention of lawmakers'." *Supra* at 895 F.2d at 574.

III. REGULATING SAME-SEX AND OPPOSITE-SEX CONDUCT DIFFERENTLY IS PERMISSIBLE DUE TO GREATER PUBLIC HEALTH RISK OF SAME-SEX CONDUCT

Petitioners assert that "As a matter of equal protection, bare condemnation of one group of people—whether termed a moral judgment, a value judgement, or simple dislike—cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny." [Petition for Review at p. 9].

The law in question can be justified without the least reliance on religious morality or social prejudice against self-identified homosexuals. What is condemned by the law is not

a "group of people" but volitional same-sex sodomy by individuals. Public health records identify such conduct as disproportionally costly to society as opposed to sodomy committed by opposite-sex partners. This is not to suggest that opposite-sex sodomy does not harm the public health, but the type and degree of harm are different enough that criminalizing one and not the other does not violate the very lenient standards for classifications set by the court. The standards have been summarized as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. [354 U.S. 457, 464]. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Morey v. Doud*, 354 U.S. 457 (1957), citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

In *Romer v Evans,* 517 U.S. 620, 631 (1996), the court ruled that "If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."

A legitimate end not addressed by the majority in the Court of Appeals is the state's interest in public health, as distinct

from public morals. The states' legitimate interest in the public health has been repeatedly affirmed by this court.

> "It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of congressional power or of private rights secured by the Constitution of the United States, the action of the states in this respect is beyond question in the courts of the nation." *L'Hote v. New Orleans,* 177 U.S. 587 (1900). See also *Barbier v. Connolly, supra* at 31.

Indeed, the state's interest in public health is deemed so compelling that this court has ruled that a viable unborn child may be killed to preserve the health of a mother at her option, *Roe v. Wade,* 410 U.S. 113, 164-165 (1973), even at the point of birth, *Stenberg v Carhart,* (99-830) affirming 192 F.3d 1142 (2000). Relative to the instant circumstances, studies indicate a significantly greater threat to public health from same-sex than from opposite-sex relationships, especially regarding AIDS. According to the most recent statistics complied by the Centers for Disease Control, same-sex relationships account for 361,867 of the 793,026 total cases of AIDS reported in the United States as of June, 2001, while homosexual intravenous drug users accounted for another 50,066 cases. This is compared to 85,738 cases caused by opposite-sex relations.[5] An alarming recent increase in drug resistance to AIDS, or AIDS "super-infection," is also highest among homosexuals.[6] The magni-

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[5] CDC website http://www.cdc.gov/hiv/stats.htm#exposure

[6] *Antiretroviral-Drug Resistance among Patients Recently Infected with HIV*, New England Journal of Medicine, Volume 347:385-394, August 8, 2002. Susan J. Little, M.D., Sarah Holte, Ph.D., Jean-Pierre

tude of the disparity between same-sex and opposite-sex conduct cannot be overlooked. According to the widely respected 1994 University of Chicago study "Sex in America: A Definitive Survey," only 5% of men and 4% of women have engaged in same-sex conduct at any time in their lives, with just 2.8% of men and 1.5% of women choosing homosexual relations exclusively.[7] There is thus a dramatically disproportionate public health risk associated with same-sex conduct as opposed to opposite-sex conduct.

Oxford University's *International Journal of Epidemiology* reported a dramatic impact on the average age of mortality for those involved in same-sex relationships.

> "In a major Canadian centre, life expectancy at age 20 years for gay and bisexual men is 8 to 20 years less than for all men. If the same pattern of mortality were to continue, we estimate that nearly half of gay and bisexual men currently aged 20 would not reach their 65th birthday. Under even the most liberal assumptions, gay and bisexual men in this urban centre are now

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Routy, M.D., Eric S. Daar, M.D., Marty Markowitz, M.D., Ann C. Collier, M.D., Richard A. Koup, M.D., John W. Mellors, M.D., Elizabeth Connick, M.D., Brian Conway, M.D., Michael Kilby, M.D., Lei Wang, Ph.D., Jeannette M. Whitcomb, Ph.D., Nicholas S. Hellmann, M.D., and Douglas D. Richman, M.D.

[7] R. Michael, J. Gagnon, E. Laumann, *Sex in America: A Definitive Survey* (Boston: Little, Brown and Company, 1994), pp. 175-177; Tom W. Smith, "*American Sexual Behavior: Trends, Socio-Demographic Differences, and Risk Behavior,*" National Opinion Research Center, GSS Topical Report No. 25, December 1998, p. 50. See also Dawson, D. A., "*AIDS Knowledge and Attitudes,*" [various dates] Advance Data, *National Center for Health Statistics:* DHHS Pub. No. (PHS) 88-1_250, nos. 160, 161, 163, 176, 183, 193 reporting on a Federal government study considered to be the largest continuing survey of homosexual activity ever conducted, reaching 119,347 randomly selected adults by March of 1991. This study revealed that only 3% of males had reported any homosexual activity since 1977.

> experiencing a life expectancy similar to that experienced by all men in Canada in the year 1871."[8]

AIDS is not the only disease disproportionally affecting same-sex partners. Unlike AIDS, these diseases are prevalent in female same-sex relationships as well. The Medical Institute for Sexual Health reported that "Homosexual men are at significantly increased risk of HIV/AIDS, hepatitis, anal cancer, gonorrhea and gastrointestinal infections as a result of their sexual practices. Women who have had sex with women are at significantly increased risk of bacterial vaginosis, breast cancer and ovarian cancer than are heterosexual women."[9]

Neither are same-sex health risks limited to physical problems but include mental health problems as well. In 2001, the Journal of the American Medical Association reported that:

Compared to other men, males who engage in same-sex conduct are:

> 727 percent more likely to have suffered bipolar disorders at some point in their lives, and 502 percent more likely in the last twelve months.
>
> 718 percent more likely to have suffered obsessive-compulsive disorder in the last twelve months, and 620 percent more likely at some point in their lives.
>
> 632 percent more likely to have suffered agoraphobia (fear of leaving home or being in public) in the last twelve months, and 454 percent more likely at some point in their lives.

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[8] Hogg, R.S., *et al.*, *Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men*, International Journal of Epidemiology, Vol. 26, 657-661, 1997.

[9] Medical Institute for Sexual Health, "*Executive Summary: Health Implications Associated with Homosexuality,*" 1999.

421 percent more likely to have suffered panic disorder, and 229 percent more likely to have suffered social phobia at some point in their lives.

375 percent more likely to have suffered simple phobia in the last twelve months, and 361 percent more likely at some point in their lives.

311 percent more likely to have suffered mood disorders at some point in their lives, and 293 percent more likely in the last twelve months.

261 percent more likely to have suffered anxiety disorders in the last twelve months, and 267 percent more likely over the course of their lifetimes.

270 percent more likely to have suffered two or more psychiatric disorders during their lifetime.

235 percent more likely to have suffered major depression at some point in their lives.

Compared to other women, females who engage in same-sex conduct are:

405 percent more likely to have suffered a substance use disorder.

241 percent more likely to have suffered mood disorders during their lifetimes.

209 percent more likely to have suffered two or more mental disorders during their lifetimes.[10]

While it cannot be stated conclusively that increased incidents of mental health and other disorders among persons involved in same-sex relationships are directly related to the practice of sodomy, such a conclusion by a state is legally permissible. It is well established that a state has broad

[10] Sandfort, Theo G.M, *et. al.*, *"Same-Sex Sexual Behavior and Psychiatric Disorders,"* Archives of General Psychiatry (Journal of the American Medical Association), Vol. 58, No. 1, (2001), cited in "*The Legal Liability Associated with Homosexuality Education in Public Schools*," Citizens for Community Values, Cincinnati, Ohio (2002).

latitude to interpret empirical data as to the secondary effects of regulated conduct. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 4, 106 S.Ct. 925 (1986), *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628 (1973).

Thus, it is no constitutional violation for the State of Texas to discriminate against same-sex sodomy.

IV. RECENT SOCIAL TRENDS ARE NOT A SUFFICIENT BASIS FOR OVERRULING *BOWERS V. HARDWICK*

Petitioners argue that *Bowers v. Hardwick* should be overturned on the grounds that "legal and social developments have undercut its reasoning and its ultimate determination that the right to privacy does not shelter the deeply personal realm of consensual, adult sexual intimacy in the home." [Petition for Review at p. 9].

While it is true that several states have repealed their sodomy laws in the years since Bowers, this fact does not justify interference with the remainder of states which have retained such laws. This court only recently affirmed its "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins,* 528 U.S. 259 (2000) and has recognized that "states possess primary authority for defining and enforcing criminal law" *U.S. v Lopez,* 514 U.S. 549 (1995). Texas would have the right to criminalize sodomy even if it were the only state to do so.

Petitioners' appeal to emotionalism, which makes up the bulk of their complaint, is equally unavailing. Euphemistic characterizations of anal sodomy as "loving behavior" [Petition for Review at p.8] and "nurturing . . . intimacy "[p.13] cannot mask the harmful nature of such conduct. Neither can such an appeal substitute for sound logic. To the extent that Petitioners implicitly suggest that their behavior is 'genetic'

or 'involuntary,' they deny their own freewill and responsibility for dangerous behavior with secondary effects. Mere sexual desire, no matter how compelling, cannot justify sexual behavior. Plainly, it is the social consequences of the behavior in question, not the "sexual orientation" of the participants, that makes sodomy properly subject to criminal sanction in the public interest.

Petitioners' disregard for social consequences, however, extends beyond their own conduct. In one blow, Petitioners would virtually eliminate the ability of states to protect their citizens from destructive sexual behavior, for, as stated in *Bowers*: if the basis for finding a right to privacy for homosexual conduct is "voluntary sexual conduct between consenting adults, it would be difficult, except by fiat...to limit . . . adultery, incest and other sexual crimes" *Bowers v. Hardwick*, *supra* at 195-196. Moreover, Petitioners' attacks against the states' ability to regulate morality are stymied by the reality that the states' powers over moral issues have been upheld time and again. *Berman v. Parker*, 348 U.S. 26 (1954); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Bowers v. Hardwick, supra*.

V. PETITIONERS' DESIRE TO HAVE A CONDUCT-BASED STATUS RECOGNIZED AS A PROTECTED CONSTITUTIONAL STATUS DEFIES CONSTITUTIONAL COMMON SENSE

The sanctity of one's humanity is not realized through a desire to sodomize, or to be sodomized by, another human being. Our humanity, individual successes, and their intrinsic Constitutional value derive from the fact that one is given the opportunity to participate in a society that justly holds one to account for socially damaging behavior. A certain dignity is bestowed upon each of us in the comforting recognition that we can be protected from the irresponsible behavior of others. The desire to be responsible for bad decisions and conduct,

and the desire to be protected from others' irresponsibility, seem to be basic human characteristics. While the Constitution may indeed protect segregated instances of irresponsible behavior, it certainly cannot be expected to dignify patterns of dangerous behavior, and a millennial history of human discernment that weighs against supporting sodomy.

Human dignity, of the kind implicit in the Ninth and Fourteenth Amendments, does not come from a revolt against basic human characteristics as suggested by Petitioners. Frankly, the desire to place one's reproductive organs in the anus of another human being does not seem to be a natural and inherent human characteristic. The desire to avoid dangerous behavior, and to hold the self to account before society's command for responsible behavior, in public, and in private, seems to be more implicit to a concept of ordered liberty. It seems self-evident that the Constitution bears evidence to a higher purpose in the governance of human affairs.[11] Any reasonably determined purpose of the Constitution hardly seems in alignment with a claimed right to sodomy.

Denials of responsibility to society, even in private sexual affairs, are not implicit in the concept of ordered liberty, nor are they reflective of the deep and rich history of this Nation. The Founders of our Nation, including William Penn, Abigail Adams, James Madison, and the others, seemingly adopted the position that citizens are to accept the lot given to them and that no man can prevent us from fulfilling our destiny within the confines of responsible Government and conscientious private conduct.

Contrary to the position of the Petitioners, liberty of the mind and body comes directly from the acceptance of that which one does not choose, even if it is an alleged genetic

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[11] Richard D. Ackerman, *The State of America's Constitution*, The Western World, (Pearson Custom Publishing, Boston, MA 2002) pp. 80-85.

disposition toward homosexual behaviors. Liberty can be found in the acknowledgment that these things matter not to the inherent dignity associated with being able to voluntarily rise to the call of responsible behavior. It seems that rising above one's genetic conditions, and successfully assimilating into a culture that promotes and demands responsible conduct, is the hallmark of dignified humanity.

Indeed, Constitutional freedom is not found in forcing a Nation to place sodomy on par with the First Amendment, or to force other individual citizens to accept personal revolts against reasonable requirements of the States under the Tenth Amendment. Being thrust, by birth, into a culture not of one's own making is not a crutch, but a rich and robust collage of opportunity that came before each citizen, and which constitutes the fundamental building blocks necessary to the fulfillment of who each person is as a citizen of this great Nation.

The homosexual agenda promoted by Petitioners, and their counsel, completely defies common sense, human dignity, and public policy. This agenda espouses, among others, several notions:

A.) People are automatically victimized by the mere fact that they were socially or genetically created in a certain way;

B.) There is a constitutional right to engage in anal sex;

C.) Recognition of the aforementioned 'right' to engage in anal sex is necessary to self-fulfillment in a Nation governed by the United States Constitution.

First, in order for a constitutional right to exist, one must show that the proposed 'right' is implicit to the concept of ordered liberty. It must also be shown that exercise of that right is something that is deeply rooted in the annals of our history. In essence, it must be shown that the deprivation of such a right would destroy the very foundations of our Nation. *See generally, Moore v. East Cleveland, Ohio*, 431 U.S. 494 (1977). Moreover any asserted fundamental liberty

interest must be specifically described. *Reno v. Flores*, 507 U.S. 292 (1993). A subjective desire/tendency to engage in anal sex hardly rises to the occasion of these legal requirements. At most, these are moral issues that, according to volumes of case law and the millennia of human history, are better left to the Will of the People through their legislatures. In fact, it is rather curious that Petitioners, and their militia of *amici*, have not even attempted to define exactly what they mean by a 'homosexual person.' Yet, they wish to have this Court create a suspect class of persons beyond the reach of the State of Texas or even the United States government. The shanty record in this case is rife with the possibility of creating an ever-changing standard of what it might mean to be in or out of the class of persons defined as 'homosexual.'

Secondly, those who promote the homosexual propaganda refuse to acknowledge that sodomite homosexualism is a matter of choice. If one can be a celibate homosexual, the behavioral nature of sodomy is self-evident and indisputable. If it is claimed that one cannot control the urge to sodomize, the need for intensified governmental regulation seems to be bolstered. Nevertheless, it is argued by the homosexual community that its members did not choose to be born a certain way. Rather, it is claimed that they must revolt against a biological identity imposed upon them simply by virtue of their human existence. This claim admits of the fact that the only way one can be self-identified or labeled as "homosexual," is by a conscious decision to 'out themselves' in the public fora. A "revolt," by its very nature, is a choice. Oddly, homosexuals claim that this 'outing' process is necessary to their success as a class of persons under the Constitution. Nothing could be further from the truth.

Some things are better left unsaid and undone, and responsible citizens cannot expect that every expression thrown into the marketplace of ideas and acceptable conduct will be purchased wholesale by the public. Moreover, it is well established by law that the state has a legitimate right to

regulate conduct, considered by the majority to be abhorrent. This Court has acknowledged that the State need not resolve every empirical difficulty that surrounds any given piece of legislation. *Renton, supra.* In other words, even if one grants that homosexuality is not understood scientifically, this does not mean that the state must give up its right to regulate homosexual related behavior before and after the scientific explanations are provided.

It is suggested by Petitioners that this Nation must accommodate all private anal sex, between adults, and other expressions of a person's sexual identity. Petitioners have not provided an appellate record that would suggest otherwise. Even so, the individual States have a right to maintain a stable social environment, untainted by deadly diseases, and the conduct that causes them. The introduction of subjective standards as to the standards for Constitutional recognition of sexual preferences are hardly conducive to maintaining these necessary goals.

Finally it is wrong for Petitioners to compare homosexual persons with minorities and women for purposes of Equal Protection, and the noble remediation of past discrimination. In fact, the advocacy of homosexuality, as a gender-based identity, destroys the very foundations of the 1964 Civil Rights Act. Were one to accept homosexual persons as a "suspect class," for purposes of discrimination laws under the Equal Protection Clause, one would only degrade the hard work and years of effort directed toward achieving racial and sexual equality in the workplace and in education.

Incredibly, the proponents of Petitioners' position argue, at a whim, a homosexual male can simply associate himself with the status of being born female or being born as a racial or ethnic minority. [NOW Brief at p. 1]. If this Court accepts that the mere tendency to engage in sodomy is a protected Constitutional status, being a woman or a racial minority becomes meaningless. If anything devalues a woman [NOW

Brief at p. 4], it is not the fact that people might be prevented from engaging in acts of sodomy. What is degrading is the notion that women have been put on par with those who do place their reproductive organs in the anus of another human being. Women and racial minorities deserve much more than that proposed by NOW.

Petitioners, and their supporters, are wrongfully convoluting the distinction between stereotypes and immutable characteristics. Stereotypes, and a Nation's creation of them, are matters of culture beyond the proper reach of this Court. If NOW, or Petitioners themselves, are in a battle over the morality of certain stereotypes [NOW Brief at p. 2], it certainly seems that this Court should not be the final judge of what culture means and how to control good or bad stereotypes about people and voluntary conduct by a limited number of persons. It is not this Court's job to determine whether or not homosexuality is consistent with 'sex roles' of men or women. *Bowers v. Hardwick, supra* at 195-196.

The American Bar Association's Brief certainly does little more to justify the destruction of the State's abi'ity to regulate certain conduct. While it may be very true that discrimination against homosexuals, in the workplace, or elsewhere, is wrong, it is not true that licentious, deadly behavior cannot be the subject of the power of the government. Anti-discrimination provisions, of the type mentioned by the ABA at pp. 7-13, have a just place in society because stereotypes can admittedly result in unfair discrimination, even on the *false belief* that someone is homosexual. Whether or not one is actually homosexual is irrelevant to the determination that employers, state bar associations, and others should not be inequitable in extending basic rights and privileges afforded to all. One cannot conceive of a situation whereby the American Bar Association, or any other business or government entity, would need to enable people to sodomize each other. Needing a job is different than 'needing' to be sodomized.

This Court can readily make the secular decision that certain types of conduct, regardless of who participates in such conduct, fall within the ambit of the Tenth Amendment. The Tenth Amendment rights of the States have not been declared dead as of yet. *See generally United States v. Darby*, 312 U.S. 100 (1941); *New York v. United States*, 505 U.S. 144 (1992)[regarding purpose of Tenth Amendment]. This Court should be no social engineer as suggested by NOW at pp. 16-17 of their Brief. *See Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986)[for proposition that policy choices and value judgments are not the purview of this Court]. NOW and other of Petitioners' *amici* fail to recognize that there is a difference between one's sexuality and what one does with that sexuality. This Court can uphold laws against discrimination and, at the same time, give full force and effect to the Tenth Amendment.

While one cannot undo their sex or race, one can choose not to engage in homosexual behavior. Again, if it is claimed that homosexual urges are beyond control, then the most dangerous of these behaviors is rightly subject to the power of the law. Moreover, if this Court accepts that anti-sodomy regulations can have a legitimate purpose in stifling the spread of disease, then such regulations relate only to irresponsible conduct. Those who engage in irresponsible conduct should not be deprived of the right to be responsible for their actions.

CONCLUSION

Petitioners have failed to state a valid Equal Protection or Due Process claim and have not shown a legal basis for overturning *Bowers*. Accordingly, the conviction of Petitioners by the State of Texas must be affirmed.

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In the
Supreme Court of the United States

John Geddes LAWRENCE
and Tyron Garner,
Petitioners,

v.

State of TEXAS,
Respondent.

On Writ of Certiorari to the Fourteenth Court of Appeals of Texas

BRIEF OF THE STATES OF ALABAMA, SOUTH CAROLINA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the United States Constitution protect the right to engage in homosexual sodomy?

2. Does the United States Constitution forbid the States to make legal classifications based on a person's choice to engage in sexual activity with another person of the same sex?

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INTEREST OF *AMICI CURIAE*

The States of Alabama, South Carolina, and Utah submit this brief as *amici curiae* in support of the respondent State of Texas, urging this Court to affirm the judgment of the Texas Court of Appeals and not to recognize homosexual sodomy as a fundamental constitutional right or as a suspect classification under the Equal Protection Clause.

Presently, some fourteen States, including *amici*, have criminal statutes prohibiting either homosexual sodomy alone or all extramarital sodomy. Many States also discourage homosexual activity through policies regarding, for example, same-sex marriage, child custody, adoption, and foster parenting. And many States have laws that regulate other kinds of private consensual adult sexual activity, such as polygamy, incest, pedophilia, prostitution, and adultery. *Amici* are concerned that, if this Court should adopt petitioners' expansive and undisciplined interpretation of the Constitution, many if not all of these laws will be invalidated.

Petitioners' interpretation of the Constitution would limit the ability of the States to express and preserve the moral standards of their communities. Under the Constitution, the States should be free to legislate in such sensitive areas as family definition, child-rearing, and sexual conduct. Absent a mandate in the text or history of the Constitution, it is not for the federal courts to decide what is right and what is wrong for all 50 States in the Union. The people, not the courts, should decide such fundamental issues for themselves.

SUMMARY OF ARGUMENT

Petitioners invite this Court to exalt will above reason and political correctness above the text and history of the United States Constitution. They would have this Court not only overrule *Bowers v. Hardwick*, which explicitly rejected their arguments, but also scuttle the teaching of numerous cases limiting the recognition of non-textual constitutional rights to those that have historically and traditionally been considered beyond the proper scope of governmental regulation. They ask this Court to interpret the Constitution according to their political wishes, not according to the rule of law.

Engaging in homosexual sodomy is not protected by the Due Process Clause of the Fourteenth Amendment or by any other provision of the Constitution. Nor is the *choice* to engage in homosexual sodomy (as opposed to the *inclination*) a suspect classification subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The legal regime that petitioners and their *amici* advocate is a creature of their imagination, one that would not have been seriously entertained by the legal establishment a mere forty years ago. Times may have changed, but the Constitution that this Court is sworn to apply in its exercise of judicial review has not. This Court should not bend the text and history of the Constitution to facilitate perceived changes in social mores that may turn out to be illusory or misguided.

The proper loci for change of the nature that petitioners and their *amici* advocate are the legislatures of the 50 States. The legislatures of the States are the bodies of government most responsive to the will of the people and best suited to forge the practical compromises necessary to preserve unity in a

rapidly changing and pluralistic society. They are best able to determine what works, and what does not, and to respond to that learning appropriately. The courts, which must apply rules, heed precedents, and decide only the cases in front of them, are ill-suited for these functions. This Court, which must make one rule for the entire Nation, is particularly ill-suited for these functions.

In short, the States should remain free to protect the moral standards of their communities through legislation that prohibits homosexual sodomy. If legislation of such activity is no longer supported by a majority of the citizens of the States, the legislatures of the States will repeal them, or elected executive officials will cease to enforce them. The recent movement toward decriminalizing homosexual sodomy, even with *Bowers v. Hardwick* on the books, shows that the legislative system is quite able to respond to popular will without judicial prodding. Impatience with the pace of change, or with the resistance of citizens who do not regard the change as beneficial, does not justify the judicial creation of a new constitutional right.

ARGUMENT

Petitioners attack Texas's homosexual sodomy statute on two fronts. First, they claim a substantive right, under the Due Process Clause of the Fourteenth Amendment, to engage in the conduct prohibited by the statute. Second, they claim that, even if Texas may constitutionally prohibit sodomy, it may not prohibit homosexual sodomy, while permitting heterosexual sodomy, without violating the Equal Protection Clause of the Fourteenth Amendment. Neither argument withstands analysis.

I. The Constitution Does Not Contain an Express or Implied Right to Engage in Homosexual Sodomy.

The text of the Constitution contains no mention of a right to engage in homosexual sodomy. The only question, then, is whether homosexual sodomy is a right "implicit in the concept of ordered liberty"[1] — *i.e.*, a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and therefore protected by the Due Process Clause of the Fourteenth Amendment.[2] To answer that question, "[w]e begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[3] Because homosexual sodomy has not historically been recognized in this country as a right — to the contrary, it has historically been recognized as a wrong — it is not a fundamental right.

A. Only activities historically considered beyond the reach of government regulation are protected by the Due Process Clause of the Fourteenth Amendment.

"[B]ecause guideposts for responsible decision-making in this unchartered area are scarce and open-ended," this Court "ha[s] always been reluctant to expand the concept of substantive due process" to recognize new fundamental rights.[4] "By extending

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[1] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

[2] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

[3] *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

[4] *Id.* at 720 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."[5] This Court has therefore cautioned that it will "'exercise the utmost care whenever [it is] asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[6] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[7]

Thus, to qualify as a fundamental right, the right in question must meet two conditions. First, it must be "deeply rooted in this Nation's history and tradition."[8] Second, it must be given "careful description," to ensure that it remains within the history and tradition that justifies its recognition in the first place.[9] One cannot argue that liberty itself is fundamental and therefore that all private activity is protected from state interference by the Constitution. In *Washington v. Glucksberg*, for instance, this Court refused to accept respondent's formulation of the issue as whether the Due Process Clause protects "basic and intimate exercises of personal autonomy."[10] Rather, the Court framed the question as "whether the protections of the

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[5] *Id.*

[6] *Id.* (quoting *Collins*, 503 U.S. at 125).

[7] *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

[8] *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

[9] *Id.* (citations omitted).

[10] 521 U.S. at 724.

Due Process Clause include a right to commit suicide with another's assistance," [11] and answered the question in the negative.

All of this Court's precedents analyzing the existence of non-textual constitutional rights evince a strong concern with the historical pedigree of the specific right in question. In *Meyer v. Nebraska*,[12] this Court premised its recognition of the non-textual right of parents to school their children privately on the long-standing importance of family child-rearing to the health and structure of American society.[13] And in *Moore v. City of East Cleveland*,[14] the Court struck down a city housing ordinance that forbade a grandmother from living in the same home with her son and two grandsons under the Due Process Clause because it violated the sanctity of the family. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." [15] This interpretational approach prevented the Court from having to draw "arbitrary lines" in the recognition of fundamental rights, by showing "careful 'respect for the teachings of history

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[11] *Id. See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973) ("Nothing [] in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation").

[12] 262 U.S. 390 (1923).

[13] *Id.* at 400-02.

[14] 431 U.S. 494 (1977).

[15] *Id.* at 503 (plurality opinion).

[and] solid recognition of the basic values that underlie our society.'"[16]

In *Griswold v. Connecticut*,[17] this Court recognized a non-textual right to use contraceptives based on the historical right to marital privacy, "a right of privacy older than the Bill of Rights — older than our political parties, older than our school system."[18] "Marriage," said the Court, "is a coming together for better or for worse, hopefully enduring, and intimate *to the degree of being sacred*." [19] In a concurring opinion, Justice Goldberg, Chief Justice Warren, and Justice Brennan insisted that non-textual fundamental rights like the one recognized in *Griswold* must derive from the "'traditions and [collective] conscience of our people."[20] On similar thinking, this Court has accorded constitutional protection to the choice of unmarried persons whether to bear children.[21]

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[16] *Id.* at 502-03 (plurality opinion) (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

[17] 381 U.S. 479 (1965).

[18] *Id.* at 486.

[19] *Id.* (emphasis added).

[20] *Id.* at 493.

[21] *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget a child . . . holds a particularly important place in the history of the right of privacy"); *Roe v. Wade*, 410 U.S. 113, 129 (1973) (recognizing non-textual right to abortion after conducting extensive survey of medical and legal history of abortion and concluding that restrictive criminal abortion statutes were "of relatively recent vintage"); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (extending *Griswold* to unmarried persons based on Equal Protection Clause).

Most recently, in *Washington v. Glucksberg*,[22] this Court denied the existence of a non-textual right to assisted suicide based on the long history of laws prohibiting suicide and assisted suicide.[23] "[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[24] The Court concluded that, while changes had occurred over time, especially in laws prohibiting or penalizing suicide itself, "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[25]

"Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause."[26] Without the constraint and guidance of history, judges would be free to legislate their own preferences at the expense of those of the American people as expressed through their elected representatives. Reference to history is the only disciplined means of recognizing a non-textual constitutional right.

B. The non-textual fundamental rights that this Court has recognized in the Due Process Clause of the Fourteenth

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[22] 521 U.S. 702 (1997).

[23] *Id.* at 720.

[24] *Id.* at 723.

[25] *Id.* at 728.

[26] *Glucksberg*, 521 U.S. at 721 (quoting *Collins*, 503 U.S. at 125).

Amendment have protected marriage, child-bearing, and the family — not extramarital sex, and certainly not homosexual sodomy.

In keeping with the historical analysis described above, this Court has primarily limited its recognition of non-textual fundamental rights in the Due Process Clause of the Fourteenth Amendment to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[27] In 1997, this Court cataloged the list as follows:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specifically protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and to abortion, [*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)].[28]

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[27] *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *Paul v. Davis*, 424 U.S. 693, 713 (1976) (same); *Population Services*, 431 U.S. at 684-85 (same).

[28] *Glucksberg*, 521 U.S. at 720.

"The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."[29]

The fundamental role of marriage and family in our society has been recognized on many occasions by the Court. In *Zablocki v. Redhail*,[30] the Court invalidated a Wisconsin statute requiring certain persons to obtain a court order before marrying:

> [T]he right to marry is of fundamental importance for all individuals. Long ago in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as "the most important relation in life," *id.*, at 205, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.*, at 211. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the right "to marry, establish a home, and bring up children" is a central part of the liberty protected by the Due Process Clause, *id.*, at 399, and in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), marriage was described as "fundamental to the very existence and survival of the race," 316 U.S. at 541.[31]

The Court went on to conclude that the right to marry is one of the "matters of family life" protected by the

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[29] *Griswold*, 381 U.S. at 495 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[30] 434 U.S. 374 (1978).

[31] *Id.* at 384.

right of privacy implicit in the Due Process Clause.[32] In *Moore v. City of East Cleveland*, the Court also dwelt on the historical role of marriage and the family in American society: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[33]

This Court has never recognized a fundamental right to engage in sexual activity outside of monogamous heterosexual marriage, let alone to engage in homosexual sodomy. Such a right would be antithetical to the "traditional relation of the family" that is "as old and as fundamental as our entire civilization."[34] Even the amorphous "right to privacy" recognized in *Griswold* and expanded upon in *Roe v. Wade* was never intended to include a right to have sex with whomever and however one pleased. In *Roe v. Wade*, this Court stated that the Due Process Clause does not include "an unlimited right to do with one's body as one pleases."[35] Twenty-five years later, in *Washington v. Glucksberg*, this Court again rejected the proposition that "all important, intimate, and personal decisions" are protected by the Due Process Clause.[36]

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[32] *Id.* at 386.

[33] 431 U.S. at 503 (plurality opinion). *See also Cleveland Board of Education v. LeFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment").

[34] *Griswold*, 381 U.S. at 496 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[35] 410 U.S. at 154.

[36] 521 U.S. at 727-28.

In his *Poe v. Ullman*[37] dissent, which foreshadowed the recognition of the marital right of privacy in *Griswold v. Connecticut*, Justice Harlan said that homosexual activity, even when "concealed in the home," was a proper matter of state concern and could be forbidden by the States:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized time has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine must be built upon that basis.[38]

Not only did Justice Harlan find no fundamental right to homosexual activity, he found a fundamental "pattern . . . deeply pressed into the substance of our social life" against such practice. Later in his

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[37] 367 U.S. 497 (1961).

[38] 367 U.S. at 545-46 (Harlan, J., dissenting).

dissenting opinion, Justice Harlan repeated his position "that adultery, homosexuality, fornication, and incest . . . however privately practiced" are subject to state proscription.[39] Subsequently, in *Griswold v. Connecticut*, Justice Goldberg wrote a concurring opinion, joined by Chief Justice Warren and Justice Brennan, in which he quoted with favor the passage from Justice Harlan's *Poe v. Ullman* dissent stating that "homosexuality and the like are sexual intimacies which the State forbids."[40] Justice Goldberg emphasized that the Court's holding in *Griswold* "in no way interfere[d] with a State's proper regulation of sexual promiscuity or misconduct."[41]

Most importantly, in *Bowers v. Hardwick*,[42] this Court squarely rejected the proposition that homosexual sodomy was a fundamental right. In so ruling, the Court resisted the temptation to decide whether laws forbidding homosexual sodomy were "wise or desirable" or whether they suited "the Justices' own choice of values."[43] Instead, the Court examined the long history of such laws, acknowledged the "limits of [its] role," and proclaimed itself "quite unwilling" to announce "a fundamental right to engage in homosexual sodomy."[44] *Hardwick* affirmed the Court's

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[39] *Id.* at 552-53.

[40] 381 U.S. at 499 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[41] *Id.* at 498-99 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[42] 478 U.S. 186 (1986).

[43] *Id.* at 190, 191.

[44] *Id.*

earlier ruling in *Rose v. Locke*[45] that a Tennessee sodomy statute did not implicate fundamental rights.[46]

"Proscriptions against [sodomy] have ancient roots."[47] "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights."[48] In 1868, when the Fourteenth Amendment was ratified, 32 of the 37 States in the Union had laws criminalizing sodomy. By 1960, all 50 States had outlawed sodomy. As of 1986, when the Court decided *Bowers v. Hardwick*, 24 States still had anti-sodomy statutes.[49] Today, 14 states, including *amici*, have laws proscribing sodomy.[50]

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[45] 423 U.S. 48 (1975).

[46] *Id.* at 50 n. 3 ("This is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny"). *See also Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (D. Va. 1975) (three-judge panel) (upholding Virginia's anti-sodomy statute against claims that it violated due process, right to privacy, and freedom of expression), *aff'd*, 425 U.S. 901 (1976).

[47] 478 U.S. at 193-95 (citing Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986)).

[48] *Id.*

[49] *Id.* (citing Survey, 40 U. Miami L. Rev. at 524 n. 9).

[50] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; Kan. Stat. Ann. § 21-3505(a)(1); La. Rev. Stat. Ann. § 14.89; Mich. Comp. Laws § 750.158, 338 (1991); Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; Mo. Rev. Stat. § 566.090; Okla. Stat. tit. 21, § 886; S.C. Code Ann. § 16-15-120; Tex. Pen. Code §§ 21.01(1), 21.06; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(a). In *Michigan Org. for Human Rights v. Kelley*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County, July 9, 1990), the Wayne County Circuit Court held the Michigan state sodomy statute unconstitutional. However, in *People v. Lino*, 447 Mich. 567, 573 (1994), the Michigan Supreme Court upheld the state sodomy statute but did not address whether it could constitutionally be applied to consenting adults.

"Against this background," the Court concluded in *Hardwick*, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[51] In a concurring opinion, Chief Justice Burger noted that homosexual sodomy had been forbidden in ancient Rome and by British common law.[52] Thus, "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[53] Justice Powell echoed Justice Burger's analysis: "I cannot say that conduct condemned for hundreds of years has now become a fundamental right."[54]

The Court in *Hardwick* also rejected the fallacious proposition that private adult conduct occurring in the home is, because of its location, protected as a fundamental right. The Court observed that, in *Stanley v. Georgia*,[55] it had held that a person did not have a right to possess and read obscene material in the privacy of his home. The right claimed in *Stanley* bore some connection to the text of the Constitution, namely the First Amendment, whereas the right to

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[51] *Hardwick*, 478 U.S. at 194 (Burger, C.J., concurring).

[52] *Id.* at 196 (Burger, C.J., concurring). *See also Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (observing "the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries").

[53] *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring).

[54] *Id.* at 198 n. 2 (Powell, J. concurring).

[55] 394 U.S. 557 (1969).

homosexual sodomy "ha[d] no similar support in the text of the Constitution" or "prevailing principles for construing the Fourteenth Amendment."[56] *A fortiori*, this Court held that there was no fundamental right to engage in homosexual sodomy just because it is done behind closed doors. "Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home."[57]

II. The Choice to Engage in Homosexual Sodomy (As Opposed to the Inclination) Is Not a Suspect Classification Under The Equal Protection Clause of the Fourteenth Amendment.

Almost all state action draws lines or classifies in some fashion. Inevitably, some persons or behaviors are disfavored.[58] The Equal Protection Clause does not prohibit all discrimination, just discrimination on the basis of certain suspect classifications.

If a statute does not discriminate on the basis of a suspect classification, it is subject only to rational basis review. This standard is used to evaluate "most forms of state action" [59] and is "the most deferential of standards" of review.[60] For a state-drawn classification to have a rational basis, it "must be reasonable, not

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[56] *Hardwick*, 478 U.S. at 194-95.

[57] *Id.* at 195.

[58] *Romer v. Evans*, 517 U.S. 620, 631 (1996) (recognizing "the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons").

[59] *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

[60] *Romer v. Evans*, 517 U.S. at 632.

arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[61] A law does not fail the rationality test merely if it "seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." [62]

Texas's statute prohibiting homosexual sodomy easily survives rational basis review. Texas is hardly alone in concluding that homosexual sodomy may have severe physical, emotional, psychological, and spiritual consequences, which do not necessarily attend heterosexual sodomy, and from which Texas's citizens need to be protected. Texas's conclusion, which is shared by other States, is certainly open to debate, but a statute does not become irrational for purposes of equal protection review just because some may hotly disagree with it.

In *Bowers v. Hardwick*, the Court did not review the Georgia anti-sodomy statute under the Equal Protection Clause.[63] Nevertheless, and of significance for the present case, the Court ruled that the statute survived rational basis review under the Due Process Clause, due to "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[64] The Court rejected the argument, also made in the present case, that the moral standards of the majority are "an inadequate

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[61] *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

[62] *Romer v. Evans*, 517 U.S. at 632.

[63] 478 U.S. at 196 n. 8.

[64] *Id.* at 196.

rationale to support the law."[65] "The law ... is constantly based on notions of morality, and if all laws representing essential moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[66]

Texas's statute therefore violates the Equal Protection Clause only if homosexual sodomy is deemed to be a suspect classification. This Court has never before so ruled. In *Romer v. Evans*, upon which petitioners and their *amici* heavily rely, this Court did not apply heightened scrutiny to Amendment 2, the Colorado law in question.[67] Rather, it applied rational basis review. Amendment 2 provided that no government unit in Colorado could "enact, adopt or enforce any statute, regulation, ordinance or policy" that gave "any minority status, quota preferences, protected status or claim of discrimination" based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[68] The Court held that Amendment 2 was irrational because it imposed a status-based classification "not to further a proper legislative end but to make [homosexuals] unequal to everyone else" in their ability to seek protective legislation.[69] The Court also placed emphasis on the complete lack of historical precedent for a law of that nature.[70]

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[65] *Id.*

[66] *Id.*

[67] 517 U.S. at 631-32.

[68] *Id.* at 624.

[69] *Id.* at 635.

[70] *Id.* at 633-34.

Unlike Amendment 2, Texas's anti-sodomy statute does not classify on the basis of status or orientation but rather on the basis of behavior that is chosen. Nor does Texas's statute create some unusual impediment to being amended in the future, should the citizens of Texas decide that they no longer want it. Texas's statute does not penalize a person for being attracted to another person of the same sex or for identifying himself or herself as a homosexual. It penalizes the act of sodomy itself, not the inclination to engage in it.

All of the classifications that this Court has recognized as suspect under the Equal Protection Clause pertain to an individual's status — some feature of their personhood that they cannot immediately control. State classifications based on race, national origin, or alienage are subject to strict scrutiny.[71] State classifications based on gender or legitimacy are subject to intermediate scrutiny.[72] But state classifications based on behavior that can be chosen have never been deemed to be subject to heightened review of any type. To do so would be the equivalent of recognizing a new fundamental right. There is no reason for this Court to introduce further doctrinal confusion by starting a parallel track of fundamental rights analysis under the aegis of the Equal Protection Clause of the Fourteenth Amendment.

This Court should save for another day the question whether state discrimination on the basis of sexual orientation, as opposed to sexual activity, is subject to

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[71] *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Plyler v. Doe*, 457 U.S. 202 (1982).

[72] *United States v. Virginia*, 518 U.S. 515 (1996); *Clark v. Jeter*, 486 U.S. 456 (1988).

heightened scrutiny under the Equal Protection Clause. A ruling on that question might have implications not just for the anti-sodomy statutes of Texas and *amici*, but also for laws that prohibit same-sex marriages and laws that permit only heterosexual couples to adopt. The Equal Protection Clause is too blunt an instrument with which to evaluate the constitutionality of the statute at issue in this case.

III. Recognizing a Fundamental Constitutional Right to Engage in Homosexual Sodomy Will Damage the Legitimacy of this Court and Enshrine a Dangerously Expansive Concept of Individual Freedom.

Contrary to the implication of petitioners and their *amici*, the question whether homosexual sodomy is a fundamental right should not be resolved by perusing the latest public opinion poll (which might in all events militate against recognition of the right). Rather, the question should be resolved according to whether the right has been historically recognized in this country. Under any disciplined analysis, petitioners and their *amici* cannot meet this test. The freedom to engage in homosexual sodomy is not implicit in the concept of ordered liberty, it has not been historically recognized as a right (to the contrary, it has been historically recognized as a wrong), and it has been explicitly rejected as a fundamental right by this Court in *Bowers v. Hardwick*. To recognize it now as a fundamental right would undermine public respect for the rule of law and would do serious damage to the legitimacy of this Court. It would also create an individual right not limited to homosexual sodomy but covering a variety of dangerous activities that have traditionally been within the police powers of the States.

First, far from supporting its recognition as a fundamental right, the recent trend toward decriminalizing homosexual activity confirms that the asserted right is not historically rooted. It also shows that the legislative process can be trusted to work, at least as far as petitioners are concerned, without judicial intervention. The fact that some States, like *amici*, have not gone along with the trend is simply an example of how this country's federalist system works. Different States have different views on the issue. Allowing laws in some States to create a constitutional right that overrides the laws of other States is a perverse theory of constitutional jurisprudence. If the trend were to reverse, would the constitutional right cease to exist? Likely the question would never have to be answered, because reversing the trend would require the States to legislate in defiance of the newly-minted constitutional right. This theory thus essentially operates as a one-way ratchet in favor of liberalism. It forces uniformity on a system of governance that was deliberately designed to ameliorate social conflict by permitting diversity and experimentation among the various States.[73]

Second, "th[is] Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[74] Yet petitioners ask this Court to discard the historical analysis it has traditionally employed in determining

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[73] *Harmelin v. Michigan*, 510 U.S. 957, 990 (1991) ("Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system") (Scalia, J., concurring, joined by Rehnquist, C.J.).

[74] *Planned Parenthood*, 505 U.S. at 866 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

the existence of non-textual due process rights, and they ask this Court to overrule a precedent directly on point without any of the traditional justifications for departing from the doctrine of stare decisis. Accepting petitioners' invitation will take this Court perilously down the path toward permanently ensconcing itself as the final arbiter of the *kulturkampf* that is currently being waged over such sensitive and divisive social issues as abortion, sexual freedom, gender identity, the definition of the family, adoption of children, euthanasia, stem cell research, human cloning, and so forth. If *Roe v. Wade* and its progeny have taught one lesson, it is that judicial attempts to resolve social disputes of this nature do not have a calming and stabilizing effect on our society. The people of this Nation do not regard as final and authoritative the rulings of this Court that stray afield from the text and history of the Constitution or statute at issue. Rather, they begin to regard the Court as just one more political branch, and they shift their political energies to changing the composition of the Court and to lobbying the Court through public demonstrations and media exhortations to "do the right thing." Tragically lost in the furor over who wins what social dispute is a public understanding of and respect for the rule of law, which is supposed to transcend ideology and shifting political fancies and is supposed to inspire reverence for and confidence in the legitimacy of our government.

In *Marbury v. Madison*,[75] Chief Justice Marshall premised this Court's power of judicial review on the irrefutable principles that the Court had an obligation to apply law to decide the case at hand and that a

[75] 5 U.S. (1 Cranch) 137 (1803).

written Constitution was the highest law of the land.[76] "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[77] Axiomatic to this seemingly aggressive assertion of the judicial role was that the courts would treat the written Constitution as *law* — as an objective, transcendent, binding force, composed of discernible rules that are applied consistently from case to case and that are bound together by logic and reason. Modern legal realism and critical legal theory notwithstanding, the written Constitution is not a malleable substance that can be deconstructed to the point that it lacks all meaningful content, and then reconstructed to conform to the will of the magistrate or official who is responsible to apply the law to the case at hand. If it could be, it would no longer be law.

Law cannot change from case to case according to the wishes of the judges and litigants. Stare decisis allows for exceptions, to be sure, for the law can never be static; but the exceptions must remain exceptions for the law to remain law. None of the conditions that this Court has recognized for departing from the doctrine of stare decisis apply to this case. *Bowers v. Hardwick* has not proven unworkable; the States and the people who live in those States have relied upon *Hardwick* by enacting anti-sodomy legislation; and the "doctrinal footings" of *Hardwick* have not been eroded.[78] If anything, in the fifteen years since *Hardwick*, this Court has cut back on its definition of

[76] *Id.* at 177.

[77] *Id.*

[78] *See Planned Parenthood*, 505 U.S. at 854-61 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing and applying principles of stare decisis to *Roe v. Wade*).

the non-textual right to privacy. In *Planned Parenthood v. Casey*, the Court affirmed the central holding of *Roe v. Wade* but permitted the States to take greater steps to protect the life of the unborn child than it had before. And in *Washington v. Glucksberg*, the Court refused to expand the right to privacy to encompass the right to die with the assistance of a physician. Nothing in these decisions augured an expansion of the right to privacy to include extramarital sexual activity of any sort.

Overruling *Bowers v. Hardwick* under pressure from those who dislike Texas's anti-sodomy statute or who are impatient with the legislative process will cause many to assume that "justifiable reexamination of principle ha[s] given way to drives for particular results in the short term."[79] The overruling would come at the possible "cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[80] "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[81] As noted, judicial review was premised on the supremacy of the *written* Constitution. While this Nation has accepted the existence of certain non-textual constitutional rights in the Civil War Amendments, it has done so only because this Court has taken care to articulate those rights with specificity and to ensure

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[79] *Planned Parenthood*, 505 U.S. at 866 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[80] *Id.* at 869 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[81] *Hardwick*, 478 U.S. at 194.

that the rights were firmly grounded in this Nation's traditions. The sexual revolution that transpired in the 1960s is insufficient warrant to read into the Constitution a whole new set of "fundamental" rights.

Third and finally, the right that petitioners advocate is so expansively defined that it will inevitably cover a variety of supposedly consensual adult activity that has always been considered to be within the traditional police power of the States. "Among the liberties protected by the Constitution," petitioners claim (Br. 10), "is the right of an adult to make choices about whether and in what manner to engage in private consensual sexual intimacy with another adult, including one of the same sex." According to petitioners (Br. 8, 12-13), "[o]ne's sexual orientation, the choice of one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty." The scope of these claimed rights is breathtaking.

It should be noted, again, that the Texas statute in question does not criminalize petitioners' sexual *orientation*, which may or may not be a matter of choice and thus may arguably be protected from state discrimination by the Equal Protection Clause of the Fourteenth Amendment. Rather, the Texas anti-sodomy statute criminalizes petitioners' sexual *activity*, which is indisputably a matter of choice. Petitioners' protestations to the contrary notwithstanding, a constitutional right that protects "the choice of one's partner" and "whether and how to connect sexually" must logically extend to activities like prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be "willing"). For all

intents and purposes, petitioners seek to enshrine as the defining tenet of modern constitutional jurisprudence the sophomoric libertarian mantra from the musical "Hair": "be free, be whatever you are, do whatever you want to do, just as long as you don't hurt anybody."[82] Bracketing for the moment the dubious proposition that any human behavior is purely self-affecting, suffice it to say that so expansive and undisciplined an interpretation of the Fourteenth Amendment would constitute a radical departure from the historical analysis that this Court has always employed in its fundamental rights jurisprudence. It would embrace the very principle rejected by this Court in *Roe v. Wade*, that "one has an unlimited right to do with one's body as one pleases."[83] And it would ignore this Court's admonition in *Glucksberg* that the Fourteenth Amendment does not protect "any and all important, intimate, and personal decisions."[84]

Contrary to the cliché so tritely tossed about in freshman poli-sci courses, the States can and must legislate morality.[85] John Stuart Mill is not a founding father.[86] "Every society in civilized time . . . has

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[82] Gerome Ragni & James Rado, *My Conviction*, on *Hair: The American Tribal Love-Rock Musical — The Original Broadway Cast Recording* (RCA Victor 1968) (transcribed by David Pirmann, 1993).

[83] 410 U.S. at 154.

[84] 521 U.S. at 725, 727-28.

[85] Aristotle, *Nicomachean Ethics* bk. 2, ch. 1, ¶ 3 (W.D. Ross trans., 1908) ("for legislators make the citizens good by forming habits in them, and this is the wish of every legislator, and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one").

[86] *Cf.* John Stuart Mill, *On Liberty* ch. 1, ¶ 9 (1869) ("the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent

traditionally concerned itself with the moral soundness of its people."[87] The mark of a free society is not just the right of the individual "to define [his or her] own concept of existence . . . and of the mystery of human life."[88] It is also the right of the individual to join with other individuals and form communities that define and order themselves according to shared beliefs. Human beings are by their nature social creatures, with concerns for the physical and moral welfare of others besides themselves. And "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[89]

Even legislation that is largely symbolic and infrequently enforced (due to other salutary checks on government power, like the Fourth Amendment) has significant pedagogical value. Laws teach people what they should and should not do, based on the experiences of their elders. The States should not be required to accept, as a matter of constitutional doctrine, that homosexual activity is harmless and does not expose both the individual and the public to deleterious spiritual and physical consequences. Those who object to traditional attitudes about homosexual

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harm to others"); *Commonwealth v. Bonadio*, 415 A.2d 47, 50-51 (Pa. 1980) (quoting Mill in concluding that Pennsylvania's anti-sodomy statute violates equal protection).

[87] *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

[88] *Planned Parenthood*, 505 U.S. at 852 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[89] *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., concurring).

conduct should take their case to the legislatures of the States, where the views and experiences of all citizens can be considered and shaped into a consensus policy. When the text and history of the Constitution is silent about the existence of a particular right, the legislature is the proper place for recognition of the new right. The courtroom is not.

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Court of Appeals of Texas should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari
To The Texas Court Of Appeals
For The Fourteenth District

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INTEREST OF THE AMICUS CURIAE[1]

Family Research Council, Inc. [hereinafter "FRC"] is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice. FRC has participated in numerous amicus curiae briefs in the United States Supreme Court, lower federal courts, and state courts.

FRC represents thousands of constituents in its efforts to protect the institutions of marriage and family in federal and state law. Toward that end, FRC has worked to strengthen the legal definition of marriage as being a union of one man and one woman, as it always has been in the United States. FRC has conducted extensive research and produced numerous publications regarding the traditions of legal, cultural, moral, and religious support for marriage, as well as regarding the tangible benefits of traditional marriage for individuals and for society.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members and its counsel made a monetary contribution to the preparation and submission of this brief.

Focus on the Family [hereinafter "FOF"] is a non-profit communications and educational organization dedicated to the preservation of marriage, parenting and the nurturing home. FOF produced a number of national and international radio broadcasts on family and cultural issues, publishes a number of magazines for family members of various ages and stages and a wider range of books as well as a website: family.org.

Millions of families in America and abroad rely on FOF for help in understanding the dynamics of their own family as well as what is happening with the family culturally and how they help strengthen both.

SUMMARY OF ARGUMENT

This argument for affirming the judgment below contains two main premises. The premises are supported by abundant authority in this Court, by the positive law (constitutions, statutes, judicial decisions) of the States, and by the convictions and habits of the American people.

These premises are, first, the sexual intimacies of married couples are constitutionally protected; non- and extra-marital sexual acts are not.[2] Second, marriage is a relation between a man and a woman.

In addition to the main premises some other premises are implied or are needed to hold up the judgment against the argument that discrimination between acts of same-sex and opposite-sex couples is impermissible. These other

[2] References in the text throughout to "sexual acts" are, unless otherwise indicated, to the acts of consenting adults in private.

premises are mostly uncontroversial facts, which reasonable legislators could surely accept as true. They concern the number and range of sexually active male-female relationships – within and outside marriage – in Texas, and the hazards of investigating and prosecuting those sexual acts. Another premise is this: States may discourage the "evils" – as this Court said in *Eisenstadt* – of sexual acts outside of marriage by means up to and including criminal prohibition.

The argument concludes that Texas may constitutionally choose to protect marital intimacy by prohibiting same-sex "deviate"[3] acts, while tolerating similar behavior by unmarried opposite-sex persons. The critical difference upon which the legal distinction rests is not the raw physical behavior but the relationships: same-sex deviate acts can never occur within marriage, during an engagement to marry, during a courtship prior to engagement, or within any relationship that could ever lead to marriage. Physically similar sexual acts between married persons are constitutionally protected.[4] Physically similar acts between unmarried persons of different sexes occur within relationships which Texas may wish to encourage, either as valuable in themselves, or because they could mature into marriages, or both.

Some legally permitted/tolerated acts occur within relationships having a very distant – if any – relation to

[3] "Deviate" indicates those specific sexual acts described in the Texas statute though, unless otherwise indicated in the text, the reference is *not* limited (as it is in the statute) to acts between persons of the same sex.

[4] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

marriage. But Texas could reasonably conclude that criminal prosecution is too blunt a tool with which to distinguish along the spectrum of opposite-sex relationships, all potentially marital and many verging on or preparing for the strictly marital. Not wishing to intrude upon, damage, and perhaps destroy valued and incipiently marital relationships, Texas could reasonably decide to leave all these opposite-sex relationships undisturbed by the criminal law.

Endeavoring to prudently protect and promote marriage by such reasonable means, Texas legislators are scarcely liable to charges of acting on mere prejudice against a class of persons, unreasoned moral hostility to certain acts, or in servile reliance upon mere popular disapproval of either.

The argument does not mean that a State is forbidden to prohibit all non- and extra-marital sexual acts. The argument does not mean that a State is forbidden to tolerate all non- and extra-marital sexual acts. The argument is consistent with both very restrictive and very permissive legal treatments of sex outside of marriage – and of regimes, including that of Texas, which fall somewhere in between.

To defeat the argument one or both of the main premises would have to, at least implicitly, be denied. Denial of either by this Court would contradict an unbroken line of holdings as old as the Constitution. Denial of either would be presumptuous and, from a social and cultural point of view, bitterly divisive.

ARGUMENT

I. THE RECORD IN THIS CASE REQUIRES EITHER THAT THE WRIT BE DISMISSED AS IMPROVIDENTLY GRANTED, OR THAT THE STATUTE BE UPHELD ON A FACIAL CHALLENGE.

This Brief argues that the Texas statute is a reasonable means of promoting and protecting marriage – the union of a man and a woman – and that no stricter standard of scrutiny is constitutionally justified. Before this Court reaches those substantive questions, however, a threshold matter must be addressed, for the Record contains insufficient evidence to permit this Court to rule on the questions presented by the Cert. Petition.

The sparse Record shows that each of the Petitioners pleaded *nolo contendre* to charges that he performed "deviate sexual intercourse with another individual of the same sex," contrary to the prohibition found in Tex. Pen. Code Ann. § 21.06 (Vernon 1994). The Record shows further that the Petitioners are adult males, and that they engaged in anal intercourse.[5]

This Court is invited by Petitioners' counsel to suppose that each Petitioner consented to a sexual act which involved no money or anything else of value, and which occurred entirely out of public view.[6] Petitioners' arguments depend upon these further suppositions. But the Record contains no evidence to support the invitation.

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[5] Pet. App. 129a.

[6] *See* Cert. Pet. 2-3.

This Court is also invited to suppose that Petitioners are homosexuals.[7] Whatever the truth of the matter, the Record provides insufficient evidence to conclude either Petitioner is, in a strong and persistent way, sexually attracted to persons of the same sex.

Petitioners' arguments call for the Court to rule on important Due Process and Equal Protection questions, including the momentous matter of overruling a recent precedent of this Court (*Bowers v. Hardwick*). Because the Record does not present a clear opportunity to adequately weigh these matters, this Court should decline to decide them.

At most the Petitioners can mount a facial challenge to the Texas law. The Court held in *U.S. v. Salerno,* 481 U.S. 739, 745 (1987), that a party making a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." Petitioners evidently concede, however, that the Texas statute *could* validly be enforced in some circumstances, including cases of deviate sex in public.

This Court should either uphold the challenged law under *Salerno* or dismiss the Petition as improvidently granted.

[7] *See* Cert. Pet., *passim*.

II. SEXUAL INTIMACIES WITHIN MARRIAGE ARE CONSTITUTIONALLY PROTECTED; NON- AND EXTRA-MARITAL SEXUAL ACTS ARE NOT AND MAY BE DISCOURAGED.

A. *Griswold v. Connecticut*

In *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), this Court described "a right of privacy older than the Bill of Rights" – that surrounding husband and wife:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. . . . [I]t is an association for as noble a purpose as any involved in our prior decisions.[8]

Griswold involved a statute that criminalized a married couple's use of contraceptives. But the *Griswold* Court articulated a broader, encompassing immunity. *Griswold*'s "marital privacy" was (as Justice White said in his concurrence) the "right to be free of regulation of the intimacies of the marriage relationship."[9] Justice Douglas asked in his opinion for the Court, "[w]ould we allow the police to search the *sacred precincts of marital bedrooms* for telltale signs of the use of contraceptives?"[10] Of course, neither the location nor the dimensions of a couple's bedroom makes it "sacred." No judge would hesitate, for example, to authorize a search of a whole home for bomb residue, stolen goods, drugs or weapons. The force of Justice Douglas's question is carried by the implicit

[8] 381 U.S. at 486.

[9] 381 U.S. at 502-03.

[10] 381 U.S. at 485 (emphasis added).

reference to what a married couple, as such, characteristically *does* in their bedroom.

The *Griswold* opinions steadily refer to the marital "relationship," to marital "privacy," and to marital "intimacy" (and "intimacies"). The Court's explicit focus was not a particular sex act, or contraceptives as such. The majority opinions even abstain from express judgments – favorable or unfavorable – about the moral worth of contraception.

Griswold is best understood as standing for the married couple's right of non-interference, or immunity, for all their consensual, private sexual acts. This understanding of *Griswold,* if not the only possible one, is surely one that reasonable Texas legislators could hold.

The *Griswold* holding has been affirmed many times by this Court.[11]

Thus, not only *may* state legislators distinguish sharply the sexual acts of millions of opposite gender couples – those who are married – from all same-sex couples, they are constitutionally obliged to do so. Whatever else they *may* do, constitutionally speaking, state legislators *must* stay out of the marital bedroom. *Griswold* squarely contradicts, therefore, the Petitioners argument that Texas may not discriminate between same-sex and opposite-sex deviate acts.

[11] *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

B. *Poe v. Ullman*

Griswold recognized the unique – "sacred" – place of marital sexual intimacies in our constitutional order. Being "sacred" means that they are beyond state interference or regulation. This elevated station implies that non- and extra-marital sexual acts stand on a different, more prosaic footing. They are open to state regulation.

In his 1961 *Poe v. Ullman* dissent (which on the merits anticipated the Court's holding in *Griswold*), Justice Harlan agreed that marriage is the distinguishing principle of sexual morality, and elaborated its implications:

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, *as well as laws forbidding adultery, fornication and homosexual practices, which express the negative of the proposition, confining sexuality to lawful marriage,* a pattern[ ] deeply pressed into the substance of our social life. . . .[12]

The State is authorized by the Constitution – and required by the common good – to *promote* marriage by respecting the privacy of the marital bedroom. The State is also within its constitutional authority – and required by the common good – to discourage sexual acts outside of marriage. The State's discouragement of fornication, homosexual acts, and other non-marital sexual activity

[12] Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) (emphasis added).

may and commonly has (as Justice Harlan said) included making crimes of some, or all, of those acts.

Justice Harlan indicated why treating the deviate acts of unmarried persons as crimes does not impose an arbitrary, majoritarian morality upon an oppressed minority. The discouragement arises not from a paternalistic desire to correct and punish persons for their sexual misbehavior, for the sake of their moral improvement. Much less does it arise from a dislike for the persons who would engage in deviate acts, same-sex or otherwise. The State's discouragement of non- and extra-marital sexual acts is a requirement of the great common (and thus objective) good of marriage.

To say, as Petitioners do, that Texas is imposing an arbitrary morality upon same-sex partners is necessarily, in light of *Griswold, Poe,* and other cases, to say that the difference between marital sexual acts and unmarried persons' casual deviate sex is arbitrary. But that assertion is false. That assertion is falsified by every legal authority available to this Court.

Petitioners' suggestion might rather be that, in a diverse society such as our own, the civil institution of marriage should swing free from all moral conceptions of it, even if those conceptions are accepted (for sake of argument) as objective, and even true. The idea might be to expand, or flatten out, the legal contours of marriage, so as to make it available to everyone on their own terms. The idea might be, in other words, to privatize marriage.

This revised suggestion must be rejected. In the first place, one might well wonder about the intelligibility of "privatized" civil marriage. Part III of this Argument aims to show, moreover, the utter incompatibility of this aspiration with our whole constitutional, legal and cultural tradition.

Finally, the aspiration to a value-free marital regime is impossible. If the opposite-sex character of marriage depends upon an illicit moral view, why not monogamy, too? Upon what proper basis is marriage limited to two persons, or three, or four? Upon what proper basis could any presumption of sexual fidelity and permanence be grounded? "Value-free" marriage would turn out to be nothing at all.

C. *Eisenstadt v. Baird*

In *Eisenstadt v. Baird*, a four-Justice majority of this Court stated that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[13] The *Eisenstadt* Court supported this conclusion by disaggregating the married couple. The *Eisenstadt* Court said:

> [T]he marital couple . . . is an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to *bear* or *beget* a child.[14]

Eisenstadt could be said to warrant reversal of the judgment in this case. The reasoning might be stated as follows: "if the right of privacy means anything, it is the right of individuals to be free of governmental regulation of sexual acts between, or among, consenting adults, at

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[13] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[14] 405 U.S. at 453.

least when the acts occur in private." This seems to be the principle of constitutional law contended for by some *amici* and, implicitly, by Petitioners.

First. *Eisenstadt* is without doubt the strongest support available in the U.S. Reports for this extraordinary principle of personal autonomy. But the reasoning of *Eisenstadt* offers no support for extending the disaggregation of marriage into the whole realm of sexual conduct, and the opinion expressly contradicts such an extension.

Eisenstadt focused on the reproductive consequences of sexual intercourse between unmarried men and women. The Justices aimed to prevent State from "punishing" fornicators with maternity or paternity. The Court referred throughout not to singles' deviate sexual acts, but to "sexual intercourse" and procreative "sexual relations." *Eisenstadt* stands, after all, for an individual's privacy regarding the "bear[ing] or beget[ting of] a child."[15] Though "bear" amounted to *dictum* (no question of an already pregnant woman's options was presented to the *Eisenstadt* Court), the *dictum* became law within a year.[16] It is *Roe* to which *Eisenstadt* pointed. *Eisenstadt* is not a preview or fount of the dissenters' views in *Bowers v. Hardwick*, or of the Petitioners' claims here.

Second. *Eisenstadt* expressly said that non- and extramarital sexual acts were "evils" (the Court's word), against which States possess a "full measure of discretion in fashioning means to prevent."[17] *Eisenstadt* did not simply

[15] 405 U.S. at 453.

[16] *See* Roe v. Wade, 410 U.S. 153 (1973).

[17] 405 U.S. at 448-49 (referring in this sentence to fornication).

grant this discretion, nor did it label fornication "evil" for argument's sake. *Eisenstadt* instead explicitly

> conced[ed] that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "evils . . . of different dimensions and proportions, requiring difficult remedies."[18]

The *Eisenstadt* Court recognized, too, that reasonable and constitutionally permissible attempts to deter fornication and adultery could include making those acts criminal.[19]

Eisenstadt does not stand for a broad right of individual sexual freedom. It affirms instead the States' traditional authority to promote marriage by deterring – even by criminal sanctions - all sexual acts outside of marriage.[20]

[18] 405 U.S. at 448 (citation omitted).

[19] *Id.* The *Eisenstadt* Court decided, however, that one could not reasonably regard deterrence of fornication, for example, as the purpose of the Massachusetts law, and therefore decided the case on other grounds.

[20] In addition to the unique moral and cultural status of marriage in our society, there is a growing body of empirical evidence regarding the tangible benefits of marriage for individuals who marry, for their children, and for society as a whole. Put simply, married people and their children are happier, healthier, safer, and more prosperous.

For example, a five-year study released in 1998 found that continuously married people experience better emotional health and less depression than people of any other marital status. *See* Nadine F. Marks and James David Lambert, *Marital Status Continuity and Change Among Young and Midlife Adults*, 19 JOURNAL OF FAMILY ISSUES 652-86 (November 1998). A 1990 review of research found that married people also have better physical health, while the unmarried have significantly higher rates of mortality – about 50 percent higher for women and 250 percent higher for men. Catherine E. Ross et al., *The Impact of the Family on Health: The Decade in Review*, 52 JOURNAL

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OF MARRIAGE AND THE FAMILY 1059-78 (November 1990). Rates of violent abuse by intimate partners are four times higher among never-married women, and twelve times higher among divorced and separated women than they are among married women (Bureau of Justice Statistics, *Intimate Partner Violence*, National Crime Victimization Survey, U.S. Department of Justice, Washington, D.C., May 2000, pp. 4-5, 10). In fact, married people are less likely to be the victims of any type of violent crime than are those who have divorced, separated, or never married (Bureau of Justice Statistics, *Criminal Victimization 1999: Changes 1998-1999 with Trends 1993-99*, National Crime Victimization Survey, U.S. Department of Justice, Washington, D.C., August 2000, p. 7).

Families headed by married couples also have much higher incomes and greater financial assets. LINDA J. WAITE, ED., THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 385-86 (2000). In addition, married couples who are sexually faithful even experience more physical pleasure and emotional satisfaction in their sexual relations than do any other sexually active people. EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 364 (1994).

Children raised by married parents, meanwhile, experience lower rates of many social pathologies, including: premarital childbearing (Kristin A. Moore, *Nonmarital School-Age Motherhood: Family, Individual, and School Characteristics*, 13 JOURNAL OF ADOLESCENT RESEARCH 433-57 (October 1998)), illicit drug use (John P. Hoffman and Robert A. Johnson, *A National Portrait of Family Structure and Adolescent Drug Use*, 60 JOURNAL OF MARRIAGE AND THE FAMILY 633-45 (August 1998)), arrest (Chris Coughlin and Samuel Vucinich, *Family Experience in Preadolescence and the Development of Male Delinquency*, 58 JOURNAL OF MARRIAGE AND THE FAMILY 491-501 (May 1996)), health, emotional, or behavioral problems (Deborah A. Dawson, *Family Structure and Children's Health and Well-Being: Data from the 1988 National Health Interview Survey on Child Health*, 53 JOURNAL OF MARRIAGE AND THE FAMILY 573-84 (August 1991)), poverty (Federal Interagency Forum on Child and Family Statistics, *America's Children: Key Indicators of Well-Being 2001*, Washington, D.C., p. 14); or school failure or expulsion (Dawson, op.cit.). These benefits are then passed on to future generations as well, because children raised by married parents are themselves less likely to cohabit or to divorce as adults

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III. MARRIAGE IS THE UNION OF A MAN AND A WOMAN.

All fifty states[21] and the federal jurisdiction limit marriage to the union of one man and one woman. Congress amended the United States Code in 1996 to state:

> In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[22]

Griswold is one of this Court's many judicial affirmations of this definition of marriage. Those affirmations include, perhaps most notably, several nineteenth-century decisions by which this Court helped to preserve monogamy as the only morally valuable form of marriage.[23]

That the married couple is comprised of man and woman is so massively, and so unequivocally settled that

(PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 111-15 (1997)).

[21] In Baker v. State, 744 A. 2d 864 (1999), the Vermont Supreme Court said that the 1777 state constitution required the legislature to extend all the legal benefits of marriage to same-sex couples. The court did not require that same-sex partnerships be assimilated to the legal category – marriage – inhabited by opposite-sex couples. And they have not been. Pursuant to state legislation, same-sex couples may now enter into "civil unions" in Vermont. Everyone who is married in Vermont is still party to a union of man and woman.

[22] 1 U.S.C. § 7 (2000).

[23] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885).

the Hawaii Supreme Court, when it was determined to legalize same-sex marriage, relied solely upon its *state* constitution. The Hawaii court recognized that the federal constitutional right of marital privacy pertained only to "unions between men and women."[24]

This Court is probably aware of political movements which seek to reform marriage law, precisely to require recognition of same-sex relationships as marriages. This Court is also probably aware of political movements which seek to re-affirm, and thereby to preserve marriage as the union of a man and a woman. The global Congressional definition quoted above is one fruit of the latter effort. FRC and FOF are proud to be associated with that effort and have made common cause with many allies in the democratic marketplace.

This Court's task in the present appeal is hardly, of course, to join one side or the other. The Constitution calls this Court instead to respect the judgments of democratic decisionmakers – past and present – and to respect this Court's own judgments, all of which limit marriage to men and women. If the composition of the legally married couple is to be changed, it is change which our Constitution leaves to the considered judgment of the people, acting through their elected representatives.

Though it is settled the definitional question calls for further comment. It is not that either the FRC or FOF supposes this Court to be so incautious as to reach out and explicitly redefine marriage to include same-sex couples. Petitioners do not overtly ask this Court to do that. But

[24] Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993).

reversal of the judgment below would *imply* that marriage is not limited to the union of man and woman, or that marriage is not the principle of sexual morality, as Justice Harlan recognized it to be. The second implication would devastate State efforts to promote and protect marriage. The first implication would abolish marriage. A reversing opinion could, of course, contain both implications.

But how could expanding the class of persons able to marry work its abolition?

The burgeoning democratic debate is only ostensibly about expanding marriage. In truth and at root it is a question of what marriage is. For depending on what marriage is, or is thought to be, marriage is either possible or impossible for same-sex couples.

The law of marriage commonly exhibits this type of dependence. It is impossible for most adults to marry at any given moment. That is because they are already married. Given that marriage is monogamous, a second marriage cannot occur so long as the first persists. Anyone who is under a certain age or who is mentally incompetent is legally incapable of marrying, too. That is because marriage is a free and voluntary commitment of incomparable magnitude.

Marriage is, and has always been understood by our law to be, a bodily, two-in-one flesh union of persons. That is why it is impossible for two men or two women to marry: it is impossible for them to enter into bodily communion. Apart from this understanding of marriage, the legal requirement of consummation (which is only fulfilled by vaginal intercourse) is unintelligible. Apart from this

understanding of marriage, there cannot be any sense in which marriage is characteristically procreative, or intrinsically ordered to having and raising children.[25]

If marriage is understood, however, as an association of individuals who seek from each other and from their relationship certain emotional, sexual, psychological satisfactions, and who set up a household with pooled finances, the ineligibility of same-sex couples to wed surely appears unreasoned, and arbitrary. Where marriage is stripped of its meaning as an integral, bodily union oriented in some sense towards procreation, there indeed

[25] The intrinsic link between marriage as the union of man and woman to procreation and child rearing is scarcely a national or continental phenomenon. It is universal, as anthropologists including Margaret Mead attest:

> When we survey all known human societies, we find everywhere some form of the family, some set of permanent arrangements by which males assist females in caring for children while they are young. . . . [I]n most societies there is the assumption of permanent mating, the idea that the marriage should last as long as both live. . . . " MARGARET MEAD, MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD 188, 195 (1949).

Concerning married adults having generally improved health, see Robert H. Coombs, *Marital Status and Personal Well-Being: A Literature Review*, 40 FAMILY RELATIONS 97-102 (1991). This was a metanalysis of 130 empirical published studies on marital status and levels of personal health and well-being.

On the importance of married parents, see SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994). This is the book from the world's leading researcher on single parent families. Interestingly, they find single parenting helps nothing. Kids from single parent families do generally half as well in the most important measures of well-being than kids with a mom and a dad.

appears to be no reason why same-sex couples may not marry.

Legal recognition of same-sex relationships as marriages would, therefore, imply the law's redefinition of "marriage," not a subtle expansion of eligibility. This redefinition – that marriage is *not* a bodily or two-in-one communion between persons of the opposite sex – would be so extraordinary and unprecedented that it would mean the end of marriage as the law, and the overwhelming majority of Americans, have always understood it. The new relationship might take the place of "marriage" in the law books. But in truth, and to almost all Americans, it would not be marriage at all. It would instead be more the sexually involved relationship of householders.

And there would, then, be no non-arbitrary basis whatsoever upon which monogamy could be legally maintained. This Court recognized keenly near the end of the last century that marriage, being a two-in-one communion, simply could not be polygamous. Notwithstanding the sincere beliefs of many people in Mormon communities in plural marriage, the fact was – and is – that marriage is for *one* man and *one* woman. One need not agree with all the measures that Congress took, and that this Court approved, to preserve marriage in Utah to see that *fundamentally* the effort was sound, and right.

We do agree with Oxford legal philosopher Joseph Raz that "monogamy, assuming that it is the only valuable form of marriage, cannot be practiced by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal

institutions.'[26] The same univocal cultural and legal commitment is necessary to sustain marriage as the monogamous union of man and woman. Once marriage is no longer a bodily communion oriented towards procreation – which is to say, no longer the union of a man and a woman – then three or more persons could as readily constitute a marriage as could two.

We are in early stages of an increasingly intense political debate about the central cultural institution of our society, of which the aspiration to same-sex marriage is more symptom than cause. It is not a debate about modestly increasing the number of people able to marry, or of incrementally adjusting our understanding of it. At stake is the *intelligibility* of marriage as we have, from time immemorial, understood it. It would be greatly inopportune, and bitterly divisive, for this Court to implicitly decide this great question by overturning the judgment below.

IV. THE TEXAS LAW HERE CHALLENGED IS A RATIONAL MEANS BY WHICH TO PROTECT AND PROMOTE MARRIAGE AS THE UNION OF A MAN AND A WOMAN.

The sharpest challenge to the Texas statute is that it is *wholly* arbitrary, even nonsense. The statute is said to evaluate the exact same "behavior" in contradictory ways. The objection so far stated fails, for it overlooks the obvious truth that the same physical movements may be entirely different human acts. Precisely the same behavior

[26] JOSEPH RAZ, THE MORALITY OF FREEDOM, 162 (1986).

may be performed by a married couple and the parties to a motel tryst. It scarcely follows that they all perform the same human act. And they do not: one is the marital act and the other is fornication. The same behavior – vaginal intercourse – may be the very different acts of fornication, adultery, statutory rape, incest, or the marital act.

The criticism, then, can only be that the same "behavior" between unmarried persons must, from a constitutional point of view, be treated as identical acts. But this begs the question. Some Texas legislators might regard deviate sexual acts between persons on the verge of marriage as morally acceptable, or at least not nearly as distant from marriage as the deviate acts of persons whose relationship is not, and could never be marital.

We turn to the manner in which similar behavior within different relationships gives rise to reasonable legislative classifications.

Marriage is not the mere creature of the state, as are stipulated institutions such as courts, legislatures, prisons, banks. Marriage existed before there was a state; its existence is not dependent upon the law. The vast majority of Americans understand marriage as an integral communion of man and woman which comes into being when the spouses say "I do." Spouses marry *themselves,* in front of a public deputy, who is usually someone quite apart from the state: a priest, minister, rabbi or other religious official.

Americans recognize that marriage is a pre-legal moral reality. This Court's recognition of the same reality is found in its many grateful references to marriage as the

pre-condition of our political institutions.[27] This universal recognition is manifest in this Court's many declarations in favor of the choice, or opportunity, to marry as a natural right which the state must respect, and which it may never abridge.[28]

Marriage is a pre-political moral and cultural institution upon which the law supervenes. The law recognizes marriage, regulates it, promotes it, protects it. *Griswold* establishes one measure of protection: marital intimacies are immune from state interference.

In order to protect and promote marriage, Texas legislators could prohibit all non- and extra-marital sexual relations. But Texas lawmakers could conclude that many potentially or incipiently marital relationships would be impaired, if not destroyed, by prosecuting the couples for private, consensual sexual acts. These legally permitted/tolerated acts include relations between engaged couples; couples who are not engaged but who nevertheless firmly intend to marry; couples seriously courting and discussing marriage; couples "going steady" and who are open to marriage and to the other as a suitable spouse, but who are not yet openly discussing marriage; couples who are just beginning to date and who, if all goes well, will soon be considering marriage. Texas legislators could reasonably conclude that, though these couples' deviate sex might be immoral, criminal prosecution would disrupt these potentially or incipiently marital relationships.

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[27] *See, e.g.*, Maynard v. Hill, 125 U.S. 190 (1888).

[28] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); Zablocki v. Redhail, 434 U.S. 374 (1978).

Texas lawmakers evidently have concluded that the common good, including the good of marriage, is better served by allowing *all* these relationships to proceed unmolested.

Besides the foregoing couples, Texas lawmakers could reasonably wish to leave undisturbed those many Texans in common-law marriages, persons who are really married but who, for one reason or another, have not a marriage license. To this group lawmakers could add those many Texas men and women, sexually intimate and functioning as mother and father, but who cannot marry because one (or both) is estranged from a spouse. Without indicating or implying any moral approval, Texas legislators could reasonably view such melded family-type groupings as better left intact, than broken by the prospect – or the reality – of criminal prosecution. (Of course, given the availability of civil divorce, these couples are potential spouses, too.) Reasonable legislators, including those who believe that all sex outside of marriage is immoral, could decide not to intrude upon all these relationships, too.

Texas legislators could hardly be unaware of the casual character of many sexual encounters between unmarried men and women. But a reasonable legislator, desiring to leave alone all married, engaged, courting, and otherwise open-to-marriage couples, would have to ask: should the "casual" or "purely physical" or "meaningless" quality of these encounters be an element of the criminal offense? Should the potential or incipiently marital quality of the relationship instead be an affirmative defense? What would satisfactory proof of either look like? How would investigating officers be able to distinguish the two types of cases? Would probable cause be present whenever an unmarried couple was reasonably believed to have

committed a prohibited act? If so, would not the dangers of intrusion upon potentially and incipiently marital relationships be already too great? How many prosecutions would succeed? Would not the temptation to perjury, or to exaggerate affections and intentions, undermine proof in almost every instance? Could a jury unanimous in their willingness to convict such couples be empaneled?

Faced with these difficulties and problems reasonable legislators who wished to promote marriage, and who believed sex outside marriage to be wrong, could reasonably conclude that the common good was better served – or less ill-served – by permitting/tolerating deviate acts between men and women.

A reasonable legislator could surely decide to leave *all* deviate sex acts alone. But a reasonable legislator could instead decide that, where marriage is not and cannot be present, incipient, or remotely in view, the common good is better served by prohibiting deviate sex acts. These legislators would recognize that police officers would be faced with nearly-impossible judgments about "casual" as opposed to "meaningful" non-marital sex.[29]

[29] Someone might naively object that promoting marriage must not be the purpose of the Texas statute. The objector might say that legislators have not *consistently,* or *seriously* or *effectively* acted on that view: many non- and extra-marital acts are left alone. This uncomprehending objection is refuted by showing, as does Section III above, the contingent and prudential nature of the judgments beneath the Texas law, a law which is not a *logical* entailment of the aim to protect marriage. No such logic is required by the Constitution. None is possible. The Texas statute is guided, though not compelled, by reason, and that is what the Constitution requires. Judging Texas lawmakers by the proffered standard would not only deny them that "full discretion" which *Eisenstadt*

(Continued on following page)

Further evidence that the Texas legislature was concerned with *marriage,* and not with *animus* towards homosexuals and lesbians, is found in other statutory prohibitions which sweep inclusively. Texas makes "deviate sexual intercourse" a crime for *everyone* – married or not, same-sex or not – when it occurs in public.[30] Everyone – married or not, same-sex or not – is liable to prosecution where sexual conduct takes place without consent, for money, or with a minor.[31]

No discrimination is made by these criminal prohibitions precisely because the end sought to be achieved bears no relation to marriage. Public decency – a concern for the sensibilities of those, especially but not only children, upon whom sexual acts may offensively intrude – *is* undermined by public sex, regardless of marriage and sexual preference. Forcible and commercialized sexual acts, as well as taking sexual advantage of minors, are all wrongs which do not depend upon or vary according to the marital status or sexual orientation of those culpable. Selling one's body for money is just as wrong, for example, when the customer is the same sex as the seller as it is when the customer is not.

If Texas legislators entertained, and wanted to act upon, some hostility to homosexuals and lesbians, they could be expected to show it in laws such as these. They might be expected to show by making homosexual child abuse an aggravated form of sexual abuse, with higher

recognized to be within their constitutional competence. It would deny them discretion altogether.

[30] TEX. PEN. CODE § 21.07(a)(2).

[31] *Id.* § 22.011(a)(1); § 43.02; § 22.011(a)(2), § 21.11.

penalties. Or, they might decriminalize prostitution between men and women, figuring it to be an almost normal expression of sexual energy, but retain criminal penalties for same-sex prostitution.

No such distinction is made, because protecting marriage, and potentially or incipiently marital relationships is not relevant to the purposes of these laws.

V. STRICT SCRUTINY IS NOT REQUIRED BECAUSE THE LAW NEITHER DISCRIMINATES AGAINST A SUSPECT CLASS NOR BURDENS A FUNDAMENTAL RIGHT.

Is constitutional scrutiny more rigorous than the "rational basis" test required in this case? It is, if the legislation discriminates against a suspect class, or if the law burdens a fundamental right.

No suspect class is involved. Neither homosexuality nor the inclination (whatever exactly it might be called) which leads one to violate the Texas statute is constitutionally suspect. The challenged law, in fact, disturbs no one for possessing any particular affection or sexual orientation: neither homosexuality nor any other affection or taste is the line drawn by the law. Those who commit acts forbidden by the law constitute the class of persons who are not married and can never be married – but who nevertheless seek sexual satisfaction with another by the proscribed means. A plausible argument for special – indeed, the highest – constitutional protection of this class of persons is hard to imagine. *Poe*, *Griswold* and many other cases falsify any such argument.

Is there some fundamental right burdened by the Texas law?[32] It surely cannot be a right to sexual satisfaction from or with another person outside of marriage. Though many persons in our society may engage in non- and extra-marital acts, they do so without the benefit of constitutional entitlement. The whole tradition of public morality described by Justice Harlan in *Poe* belies such a contention.

Perhaps in light of these obvious impediments, some *amici* argue for what amounts to a libertarian, or Millian, principle of personal autonomy: *all* private, consensual sexual acts involving persons over a certain age are

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[32] This case may appear to involve one fundamental right squarely favoring Petitioners: the Fourth Amendment right to be free from unreasonable search and seizure. Petitioners were seized not only upon private premises, but in the home of one of them (Lawrence). Perhaps Justice Douglas's query in *Griswold* could be adapted to Petitioners' situation: should we search his bedroom for telltale evidence of their deviate acts?

Perhaps not. But that question – whether probable cause to believe that deviate sex acts may be occurring at home should *by itself* justify for non-consensual entry, search, and arrest – has nothing to do with deciding this case. No resolution of the question *could* justify, even in part, reversing the court below.

Why? One reason is that Petitioners seek a judgment that the Texas sodomy statute is unconstitutional. But the statue is not limited to acts occurring in persons' homes, to acts occurring in non-residential private places, or to any place at all. It prohibits certain conduct, wherever it occurs. Any resolution of the home-search question could, therefore, only *limit* application of the statute.

The second reason is that the police entered Lawrence's dwelling lawfully, based upon reasonable cause to believe that *another* crime – a "weapons disturbance" – was underway. Because the entry was lawful, evidence of Petitioners criminal acts were in plain view. Observations made by police officers from a vantage point they lawfully occupy are not Fourth Amendment activity at all.

"private" – none of the State's business.[33] These arguments depend upon broad philosophical concepts of self-sovereignty, self-definition, and non-interference by the State. They are best supported, if they are supported by anything in this Court's precedents, by the so-called Mystery Passage in *Planned Parenthood v. Casey*:[34]

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.[35]

No question of belief is controverted here. Texas has taken no steps to deny anyone's beliefs in the value or desirability of the deviate *acts* proscribed by the statute. Treating the *Casey* passage, then, as support for a liberty to perform certain (allegedly harmless) sexual acts, we see clearly that it is the *Eisenstadt*-extension argument stated and refuted in Part II of this Brief.

But *Casey* came after *Eisenstadt*. Did *Casey* implicitly undermine *Eisenstadt*'s controlling statements that fornication and adultery were "evils", and that the States had a "full measure of discretion" in choosing the means of combating them?

No. This Court's post-*Casey* decisions make it clear that philosophical abstractions, including the Mystery Passage, are not sources or founts of fundamental rights.

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[33] So described, the principle would constitutionally immunize prostitution.

[34] 505 U.S. 833 (1992).

[35] 505 U.S. at 851.

Abstractions such as personal autonomy are, at most, useful descriptions of some of the Court's holdings:

> That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are protected . . . and *Casey* did not suggest otherwise. . . . By choosing th[e] language [of the Mystery Passage] the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.[36]

Glucksberg is this Court's standing order on Due Process methodology. That case also established beyond doubt that fundamental rights do not arise from the urgency or intensity with which proponents advance their claims on behalf of them, from the asserted importance of the matter to them, or from any *subjective* basis at all. Rather, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[37] A glance at that history and tradition conclusively shows that there is no fundamental right to fornication, adultery, homosexual sexual acts, or to any other sexual acts apart from marriage.

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[36] Washington v. Glucksberg, 521 U.S. 702, 727, 728 (1997) (citations omitted).

[37] 521 U.S. at 720-21 (citation omitted).

These same traditions and practices illumine the initial matter of "careful description" of the asserted fundamental interest.[28] The level of generality (or specificity) with which the right or interest is properly stated depends upon the categories and distinctions deemed relevant by history and tradition. The whole tradition establishes that, outside of marriage, no one has a constitutional right to the undisturbed pursuit of sexual intimacies with another. To borrow the *Glucksberg* Court's application of these criteria to the question of assisted suicide, it would "reverse centuries of legal doctrine and practice, and strike down the considered policy choices of almost every State" to hold otherwise.

CONCLUSION

The judgment of the Texas court should be affirmed.

Respectfully submitted,

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[28] *Id.*

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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE
and TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Texas Court of Appeals for the Fourteenth District

BRIEF OF TEXAS EAGLE FORUM, DAUGHTERS OF LIBERTY REPUBLICAN WOMEN, HOUSTON, TEXAS AND SPIRIT OF FREEDOM REPUBLICAN WOMEN'S CLUB AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[*]

Texas Eagle Forum is a nonprofit corporation dedicated to encouraging women and men to participate in the process of self-government and public policy-making so

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties have authored this brief in whole or in part, and no one other than *amici* or their members or their counsel have contributed money or services to the preparation or submission of this brief.

that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. Pursuant to this goal, Texas Eagle Forum researches problems concerning the status of women and their civil, legal, economic and social rights by means of conferences, lectures, study groups, and mailings. Texas Eagle Forum believes that rights of women are best defended and strengthened by a robust concept of sexual complementarity, rather than androgyny or sexual dominance.

Texas Eagle Forum believes that a ruling by this Court that would characterize the Texas statute at issue as legislating adherence to sexual stereotypes and subject to heightened scrutiny under Equal Protection analysis would undermine the progress of women in this country.

Daughters of Liberty Republican Women, Houston, Texa6s, works to promote better government "of the people, by the people, and for the people," at the local, state, and national levels. The Daughters support legislation that protects and promotes values basic to the American heritage, and essential to the health of the national culture.

Daughters of Liberty Republican Women believe that the Texas statute at issue in this case treats both sexes evenhandedly and is a constitutional exercise of the state's police power.

The Spirit of Freedom Republican Women's Club actively supports the Founding Fathers' vision of a just and moral society. It continues the Republican Party's tradition of supporting full political equality of women as evidenced by the fact that twenty-six of the thirty-six states ratifying the Nineteenth Amendment giving women the right to vote had Republican legislatures.

The Spirit of Freedom Republican Women's Club believes that Section 21.06 is consistent with this country's long history of prohibiting same-sex sodomy and does not violate any provision of the Constitution.

To assist the Court in addressing the issues presented by this case, *amici* submit this brief.

SUMMARY OF THE ARGUMENT

In order to sustain the Petitioners' challenge to the Texas statute, this Court must have greater knowledge of the facts surrounding Petitioners' conduct and the passage of the Texas law than can be gleaned from the present record. The inadequate record justifies dismissal of this case on the basis that the writ of certiorari was improvidently granted. Absent such disposition, the proper standard of review of the Texas statute is rational basis.

Section 21.06 is gender-neutral on its face and applies to men and women in the same manner. The record provides no legislative history of the statute suggesting its passage was motivated by sexual animus, and the history of Texas is one filled with support for the accomplishments of both sexes. In enacting the statute, the state of Texas could rationally seek to promote sexual integration of men and women based upon the complementarity of the sexes, a goal within the constitutional authority of the state.

The ruling of the lower court should be affirmed or the writ should be dismissed as improvidently granted.

ARGUMENT

I. The Inadequate Evidentiary Record in this Case Warrants Dismissal of the Writ of Certiorari as Improvidently Granted.

Before this Court can reach the substantive issues in this case, it must address an important threshold issue. There is no evidence in the record from which this Court could base a ruling on the questions presented by the Petition for Writ of Certiorari. The record reveals only that petitioners pled *nolo contendre* to charges that each engaged in "deviate sexual intercourse with another individual of the same sex" in violation of Tex. Pen. Code Ann. § 21.06 (Vernon 1994). *Lawrence v. Texas*, 41 S.W.3d 349, 350 (Tex. App. – Houston [14th Dist.] 2001) (quoting the statute). The record in this case only shows that the petitioners were adult males who engaged in "anal sodomy." Pet. App. 129a.

The record contains (1) no evidence that the sexual act was consensual and not done by force; (2) no evidence that it was not an act of same-sex prostitution; and (3) no evidence that each of the men had the mental capacity to consent.

Petitioners' primary claim is that this Court should create a fundamental right to engage in private adult consensual same-sex sodomy. This Court should not undertake review of such a claim when it is unclear that the facts of this case present an opportunity for this Court to rule on such an issue. "This Court has often refused to decide constitutional questions on an inadequate record." *Ellis v. Dixon*, 349 U.S. 458, 464 (1955) *citing International Brotherhood of Teamsters v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948); *Rescue Army v. Mun. Court*, 331 U.S. 549 (1947); *Aircraft & Diesel Equipment Corp. v. Hirsch*,

331 U.S. 752 (1947); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450 (1945).

Based upon the inadequate factual record before this Court, at most, Petitioners can make a facial challenge to the Texas law. As such, this Court should apply the standard articulated in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be valid"). Even the Petitioners concede that the Texas law could be enforced against individuals who engaged in public same-sex sodomy, or against those who would engage in sodomy with a same-sex partner who is unable to consent. Pet. Br. at 6. Clearly the law would be enforceable in the context of same-sex prostitution. These applications make the law constitutional under the *Salerno* standard.

Therefore, because the record before this Court does not clearly present the facts of same-sex sodomy performed in private between consenting adults, this Court should either uphold the Texas law under *Salerno* or dismiss the petition as improvidently granted.

II. Section 21.06 Does Not Facially Discriminate on the Basis of Gender.

Section 21.06 prohibits engaging in oral sex or sodomy "with another individual of the same sex." Tex. Pen. Code Ann. § 21.06 (Vernon 1994). Similar to the statute at issue in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1972) that established a hiring preference for veterans, the Texas statute is gender neutral on its face. Neither men nor women may engage in the prohibited conduct. Statutes that do not classify individuals on the basis of race or other criteria that this Court has held

to be constitutionally suspect (e.g. gender, alienage, or illegitimacy) are to be reviewed to determine whether the classification utilized is rationally related to a legitimate state interest. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

Recognizing, however, that even facially neutral laws may hide unconstitutional intentions, the *Feeney* Court went on to inquire whether "a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 442 U.S. at 279. This Court employed the same standard in its review of allegations that imposition of the Georgia death penalty was racially biased. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (a legislative action may violate equal protection if it is taken, at least in part, "because of" rather than "in spite of" its adverse effects upon an identifiable group).

In *Feeney* 98% of all Massachusetts veterans were male at the time of the litigation. *Feeney*, 442 U.S. at 269 n. 21. This fact led the Court to inquire whether the statutory preference for veterans was motivated, at least in part, "because of" its adverse effect upon women. Nothing in the legislative history supported such a conclusion.

Notwithstanding the evidence in *Feeney* that men benefited disproportionately from the statutory preference for veterans, this Court concluded, "[t]he appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex." *Id.* at 281. Therefore the Court concluded that the law was constitutional. *Id.*

This analysis is consistent with that adopted by courts in states having constitutional equal rights provisions.

Reviewing courts have consistently held that laws that are gender neutral on their face are *not* subject to constitutional challenge under a state equal rights provision solely on the basis of proof that the law in question has a disparate impact upon the members of one sex. To establish even a *prima facie* violation of a state equal rights amendment, the party challenging a gender-neutral law must show that the law was enacted with an *intent* to discriminate and not merely with the *knowledge* that some disparity would result. *See Wendt v. Wendt*, 757 A.2d 1225, 1243-45 (Conn. App. Ct. 2000) (unequal division of marital property in divorce proceedings); *People v. Adams*, 597 N.E.2d 574, 585 (Ill. 1992) (mandatory HIV testing of prostitutes); *State v. Spina*, 982 P.2d 421, 437 (Mont. 1999) ("the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose"); *Crabtree v. Montana State Library*, 665 P.2d 231 (Mont. 1983) (veterans preferences in public employment); *Buck v. Commonwealth of Pennsylvania, Dep't of Public Welfare*, 566 A.2d 1269, 1273 (Pa. Commw. Ct. 1989) (party challenging facially neutral rule on the ground that its effects upon a class of women were disproportionately adverse was required to show that the rule was adopted because of, not in spite of, its adverse effects upon an identifiable group); *Arnold v. Dep't of Ret. Sys.*, 875 P.2d 665, 670-71 (Wash. Ct. App. 1994) (prohibiting divorced spouses of law enforcement officers and firefighters from obtaining retirement benefits).

In the present case, there is *no* evidence in the record that §21.06 has adverse effects upon men or women as an identifiable group. Similarly the record is *absolutely devoid* of any showing that §21.06 reflects a legislative purpose to discriminate against women or men. The absence of such evidence may explain why Petitioners relegated the claim that §21.06 employs a gender-based classification to a mere footnote in their brief to this Court. Pet. Br. at 32 n. 24.

In the absence of any evidence showing adverse effects of the statute upon men or women as a class, or any evidence showing a legislative purpose to discriminate against men or women as a class, there is no basis for this Court to determine that §21.06 is a gender-based statute that violates Equal Protection.

III. Characterizing Section 21.06 as a Gender-based Law and Subjecting It to Heightened Scrutiny Would Distort Equal Protection Jurisprudence.

Characterizing §21.06 as a gender-based law would subject it to heightened scrutiny under the Equal Protection Clause. "For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Nguyen v. INS*, 533 U.S. 53, 60 (2001)(internal quotation marks omitted). Heightened scrutiny reflects this Court's sensitivity to the fact "that our Nation has had a long and unfortunate history of sex discrimination" *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)(plurality opinion). Balancing that sensitivity is recognition that "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

Amicus to Petitioners, NOW Legal Defense and Education Fund ("NOW") argues that §21.06 "impermissibly requires adherence to gender stereotypes." NOW Br. at 4. With absolutely no citation to the record or any *factual* statement about Texas or the law at issue, NOW asserts:

> By legally prohibiting men from being sexually intimate with other men, the state effectively enforces the notion that men must not "act like women" in a way that undermines the predominant view that men are fundamentally different from, and superior to, women. By legally prohibiting women from being sexually intimate from other women, the state effectively enforces the notion that female sexuality exists solely for men and that women must not assume "masculine" roles that challenge the traditional view that they are naturally dependent on and subservient to men.

NOW Br. at 14-15.

NOW's unsupported allegations of sexism by the state of Texas disregard the physiological reality of sexual difference, the historical reality of respect for women's talents and abilities in Texas, and the lack of any logical connection between a belief that the state may constitutionally prohibit homosexual acts and a belief in male sexual dominance.

The proper standard of review for §21.06 is rational-basis review. Public health considerations provide a rational basis for §21.06. Mr. Lawrence and Mr. Garner were convicted of violating the law because they engaged in anal sodomy. Pet. App. 129a. Anal sodomy poses health risks that do not accompany the act of vaginal penile intercourse because of the differences between the vagina and the anus. "The vagina is surrounded by thick muscular tissue which distends and changes shape to accommodate the erect penis during intercourse." Jeremy Agnew, *Some anatomical and physiological aspects of anal sexual practices*, 12 Journal of Homosexuality, No. 1, 75, 91 (Fall 1985). The nature of these muscles makes them "capable of protecting against

abrasion during intercourse . . . ." *Id.* In contrast, the anus has a far more limited capacity to expand because it is firmly attached to the tailbone, and it is vulnerable to tears at its point of attachment. Because veins and arteries surround the anus, any tears may lead to substantial bleeding. *See* Keith L. Moore, CLINICALLY ORIENTED ANATOMY 385 (2nd ed. 1985). Accordingly, receptive anal sex may cause physical trauma to the anus and the rectum that does not occur with vaginal penile intercourse. The biological distinction between anal sodomy and vaginal penile intercourse evidences that the Texas law is grounded in physical facts, not archaic stereotypes.[1]

Despite the suggestion of NOW that §21.06 was intended to foster a traditional view that women are "naturally dependent on and subservient to men" (NOW Br. At 15), the state of Texas has a long-standing history of respect for the talents and abilities of women. Since its founding in 1883 the University of Texas has been open to both sexes. Texas State Library and Archives Commission, *Votes for Women: The Women's Suffrage Movement in Texas,* <www.tsl.state.tx.us/exhibits/suffrage/battle/page2.html>. In 1919, Texas became the ninth state in the Union and the first Southern state to give women the right to vote by ratifying the Nineteenth Amendment to the United States Constitution. Texas State Library and Archives Commission, *Votes for Women: The Women's Suffrage Movement in Texas* <www.tsl.state.tx.us/exhibits/suffrage/victory/page4.html>. In 1925, Texas was the first state in the Union to have a Supreme Court comprised entirely of women. Debbie Mauldin Cottrell, *All-Woman Supreme Court* in THE HANDBOOK OF TEXAS ONLINE at <www.tsha.utexas.edu/handbook/online/articles/view/AA/jpa1.html>.

[1] The public health and safety reasons supporting prohibition of same-sex sodomy are explored in greater detail in the amicus brief filed on behalf of the Texas Physicians Resource Council *et al* in support of Respondent.

Texas women have served at the highest elected levels of government, including Governor, State Supreme Court Justice, and United State Senator.[2] In fact, Texas is the only state to have elected two women to serve as governor. *See* Phillip L. Fry, *Governor* in THE HANDBOOK OF TEXAS ONLINE at <www.tsha.utexas.edu/handbook/online/articles/view/GG/mbg3.html>.

This is hardly the history of a people convinced that men are "superior" to women and that women "are naturally dependent on and subservient to men." *Compare* NOW Br. at 14-15.

NOW's allegations, had they any support in the record, Texas history, or logic would seemingly require this Court to distinguish legitimate biological differences between men and women, and questionable stereotypes. However, to paraphrase the Washington Supreme Court:

> To decide important constitutional questions upon a complaint as sterile as this would be apt to erode public respect for the [heightened standard of review for gender-based classifications] and deter rather than promote the serious goals for which it was adopted.

Cf. MacLean v. First Northwest Indus. of America, Inc., 635 P.2d 683 (Wash. 1981)(affirming trial court's refusal to allow amendment of petition to allege "ladies night" discount for basketball tickets violated state's Equal Rights

[2] *See* Phillip L. Fry, *Governor* in THE HANDBOOK OF TEXAS ONLINE at <www.tsha.utexas.edu/handbook/online/articles/view/GG/mbg3.html>, Justices of the Supreme Court of Texas <www.supreme.courts.state.tx.us/justices.htm>, webpage of United States Senator Kay Baily Hutchison <www.hutchison.senate.gov>.

Amendment). *See also Nguyen v. INS*, 533 U.S. 53, 73 (2001)("Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.")

IV. Section 21.06 has a Rational Basis.

Section 21.06 is premised upon a truth recognized by this Court in *United States v. Virginia*, 518 U.S. 515 (1996). "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . ." *Id.* at 533. This celebration arises from the unique union experienced with the coming together of a man and a woman.

> Human society requires that we learn to value difference within community. In the complementarity of male and female we find the paradigmatic instance of this truth .... [It] invites us to learn to accept and affirm the natural world from which we are too often alienated. Moreover, in the creative complementarity of male and female we are directed toward community with those unlike us. In the community between male and female, we do not and cannot see in each other mere reflections of ourselves. In learning to appreciate this most basic difference, and in forming a marital bond, we take both difference and community seriously.

The Homosexual Movement: A Response by the Ramsey Colloquium, FIRST THINGS, March 1994, at 15, 18. *See also* George Dent, *The Defense of Traditional Marriage*, 15 J. L. & POL. 581, 632-33 (1999).

The truth of this insight is reflected in the marriage laws of the fifty states, each of which permits marriage only

as the union of one man and one woman. These laws are affirmed in federal law by the Defense of Marriage Act. 28 U.S.C. §1738C.

It is this truth that was repudiated by Virginia's anti-miscegenation laws reviewed by this Court in *Loving v. Virginia*, 388 U.S. 1 (1967). Blinded by that state's history of racial separation and a desire to maintain the supposed superiority of whites, Virginia refused to repeal or judicially overturn its century-old ban on inter-racial marriage. *See Loving v. Commonwealth*, 147 S.E.2d 48 (Va. 1966). After reviewing the history of the Virginia statute and the Fourteenth Amendment, this Court struck down the marriage ban as violating Equal Protection. *Loving v. Virginia*, 388 U.S. 1, 6-12 (1967).

The Texas statute before this Court today has no similar history of unconstitutional motivation. Quite the contrary. As noted by the Texas Court of Appeals below:

> [W]e find nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender.

Lawrence v. State, 41 S.W. 3d 349, 357-58 (Tex. App.-Houston [14th Dist.] 2001).

There are inherent differences between the sexes. To deny this truth is to deny reality. Section 21.06 is premised upon this truth. It promotes the integration of the sexes, a constitutionally permissible goal.

V. Section 21.06 Furthers the State's Interest in the Protection of Public Morality.

NOW challenges the continuing legitimacy of the state's ability to promulgate and enforce laws to enforce public morality. NOW Br. at 3, 5-7, 10-11, and 24. Yet promotion and protection of public morality is a long established aspect of the states' police power. *E.g.*, *New Orleans Gas v. Louisiana Light*, 115 U.S. 650, 661, 666-72 (1885) (*citing Gibbons v. Ogden*, 9 Wheat 1, 203 (1824)); and *Mugler v. Kansas*, 123 U.S.623, 658-59, 661-65, 668-69 (1887)). Its genesis predates the founding of this nation.

At the end of his second term as president of this nation George Washington said:

> 'Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free government. Who that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.

George Washington, *Farewell Address in* OUR SACRED HONOR 369 (William J. Bennett ed., 1997).

His successor, John Adams, expressed similar sentiments in a letter to his cousin Zabdiel Adams:

> The only foundation of a free Constitution, is pure Virtue, and if this cannot be inspired into our people, in a greater Measure, than they have it now, They will not obtain a lasting Liberty.—They will only exchange Tyrants and Tyrannies.

John Adams, *John Adams to Zabdiel Adams, June 21, 1776 in* OUR SACRED HONOR 371 (William J. Bennett ed., 1997).

The power to enforce public morality reflects the need to regulate and protect the social atmosphere and environment in much the same way communities need to regulate and protect the physical environment. Both powers are necessary to ensure the continuing health of the community. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62-64 (1973).

Absent this power, it is difficult to imagine on what basis current laws prohibiting bestiality or forbidding sex with minors could be sustained. Although not at issue in this litigation, such laws are the subjects of intense academic debate. *See e.g.* Midas Dekkers DEAREST PET (Paul Vincent trans., W.W. Norton & Co. 1994), and Judith Levine, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2002). If an animal does not evidence pain from sexual contact; if a child seemingly agrees to engage in sex; if "no one is hurt"; from where is the power of the state to forbid such conduct to be derived if the states no longer have the power to enforce public morality?

Rules of law and even the very concept of a "rule of law" are grounded in morality. The issue presented by this case is not whether §21.06 reflects a moral judgment. It plainly does. The issue is whether the people of Texas, through their elected representatives have the right to make such a judgment, in light of the Constitution and this country's historical prohibition of sexual contact by members of the same sex. Absent a radical departure from the present state of the law, (*Bowers v. Hardwick*, 478 U.S. 186 (1986)) the answer is clearly "Yes, the people of Texas may make such a judgement consistent with the Constitution of the United States."

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Respondents, this Court should affirm the judgment of the Texas Court of Appeals for the Fourteenth District, or in the alternative, dismiss this appeal on the basis that the writ was improvidently granted.

Respectfully submitted,

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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ of Certiorari
To The Court of Appeals of Texas
Fourteenth District

BRIEF OF AMICUS CURIAE CONCERNED WOMEN FOR AMERICA, IN SUPPORT OF THE STATE OF TEXAS, RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Concerned Women for America ("CWA") is the nation's largest public policy organization for women. Located in Washington, D.C., CWA is a non-profit organization that provides policy analysis to Congress, state and local legislatures and assistance to pro-family organizations through research papers and publications. CWA seeks to inform the news media, the academic community, business leaders and the general public about family, cultural and constitutional issues that affect the nation. CWA has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts and state courts.[1]

The issues in this case directly affect the constitutional right of the states to exercise their police power to protect public health, safety and morals.

CONSENT TO FILE BRIEF

Petitioners and Respondent, through their counsel of record respectively, have granted consent to the filing of this Brief *Amicus Curiae* in support of Respondent. Their letters of consent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Amicus respectfully urges this Court to dismiss the *Petition for Certiorari* as improvidently granted because the

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[1] This brief was authored by Janet M. LaRue, Chief Legal Counsel for Concerned Women for America, and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

record below does not provide a sufficient basis for the Court to decide the questions on which *certiorari* was granted.[2] In the alternative, the Court is urged to affirm the decision below because Petitioners cannot sustain their burden to demonstrate that no set of circumstances exists under which the statutes would be valid.[3]

The record below is virtually nonexistent, except for the scant statement that the arresting officers "observed appellants engaged in deviate sexual intercourse." Nothing in the record establishes whether the conduct was consensual, noncommercial, or whether anyone else was present to observe the conduct. Nothing establishes that the arresting officers knew Petitioners' sexual orientation at the time of the arrest or that it mattered to the officers. Furthermore, Petitioners did not establish in the proceedings below that they are homosexuals. Petitioners concede that there are circumstances under which the statues may be validly enforced.

The Texas statutes at issue do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The statutes are facially neutral in that they prohibit same-sex "deviate sexual intercourse." They criminalize conduct, not status. The statutes do not discriminate on the basis of sexual orientation or sex (gender) because they apply equally to two women or two men regardless of their orientation. Even if the statutes discriminated on the basis of sexual orientation, for equal

[2] *New York v. Uplinger*, 467 U.S. 246 (1984); *Illinois v. Gates*, 462 U.S. 213 (1982) (writ of *certiorari* to review a decision holding unconstitutional a New York law prohibiting loitering for the purpose of engaging or soliciting another person to engage in deviate sexual intercourse).

[3] *United States v. Salerno*, 481 U.S. 739 (1987).

protection purposes, sexual orientation is not entitled to anything more than rational basis scrutiny.[4]

Homosexuals do not meet the criteria for a "suspect class" because they do not meet the "traditional indicia of suspectness."[5] Homosexuals have enormous political, legal, cultural and economic power according to their own publications. If the Court were to extend heightened protection to homosexual "orientation," the Court would open the door to equal protection claims by numerous groups seeking minority status on the basis of their sexual "orientation." Immutable characteristics, not conduct, should remain the basis for identifying a "suspect" class.

The statutes do not violate a fundamental constitutional right. There is no constitutional zone of privacy that shields same-sex "deviate sexual intercourse" from state regulation.[6] Protecting public health, safety and morals is a rational, if not compelling, reason to prohibit same-sex "deviate sexual intercourse."

The Court is respectfully urged to defer to the police power authority of the State of Texas to do so under the statutes in question.[7]

[4] *Romer v. Evans*, 517 U.S. 620 (1996).

[5] *Bowen v. Gilliard*, 483 U.S. 587 (1987).

[6] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[7] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

ARGUMENT

I. THE PETITION FOR THE WRIT OF *CERTIORARI* SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

A. When The Record Below Does Not Provide A Sufficient Basis For The Court To Decide The Constitutional Questions On Which A Petition For *Certiorari* Was Granted, The Petition Should Be Dismissed.

In *Uplinger, supra,* Justice Stevens concurred in dismissing a *cert.* petition after full briefing and oral argument. He reasoned that when the "posture, record, or presentation of issues makes it an unwise vehicle for exercising the 'gravest and most delicate' function that this Court is called upon to perform, the Rule of Four should not reach so far as to compel the majority to decide the case."[8]

In *Gates*, *supra*, the Court emphasized the need of a sufficient factual record to rule on a question:

> Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we "promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions." ... Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances.[9] [Internal citation omitted.]

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[8] *Uplinger,* 467 U.S. at 251.

[9] *Gates*, 462 U.S. at 224; *See Board of Education v. Pico*, 457 U.S. 853 (1982) (White, J. dissenting.).

B. The Record Below In This Case Does Not Provide A Sufficient Basis For The Court To Decide Whether Petitioners Were Discriminated Against In Violation Of The Fourteenth Amendment To The United States Constitution; Therefore, The Petition for Certiorari Should Be Dismissed

Texas Penal Code §§ 21.06 and 21.01 ("statutes"), under which Petitioners were charged, prohibit same-sex "deviate sexual intercourse" whether oral or anal. Sexual orientation is not an element of the offense.[10]

The statutes do not discriminate on their face on the basis of sexual orientation or any persons or classes of persons. They criminalize sexual conduct not sexual orientation or status. Although "homosexual conduct" is the title of § 21.06, it may be applied to heterosexuals, homosexuals, lesbians or bisexuals. Texas is not required to prove the sexual orientation of the persons in order to prosecute. Liability is based solely on whether persons of the same sex engaged in "deviate sexual intercourse" with each other.

The statutes do not discriminate based on sex (gender). They are enforceable against a woman who engages in "deviate sexual intercourse" with another woman and a man who does so with another man.

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[10] Texas Penal Code § 21.06: "Homosexual Conduct: (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor."

Tex. Pen. Code § 21.01: "(1) 'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

The record below consists only of two one-page probable cause affidavits filed by the arresting officers. The affidavits are identical except for the identification of the defendant [each a Petitioner herein]. The opinion below includes a scant statement from the record describing the incident that led to the arrests: "While investigating a reported 'weapons disturbance,' police entered a residence where they observed appellants engaged in deviate sexual intercourse."[11]

Nothing in the record below indicates whether the sex act was consensual or noncommercial, or whether anyone else was present to observe the conduct. Nothing in the record indicates that the arresting officers knew or had any basis to know Petitioners' sexual orientation at the time of the arrest. Nothing in the record indicates that the sexual orientation of Petitioners was a reason for the arrests. Nothing in the record provides any basis to presume that the officers would not have arrested Petitioners if the officers had believed Petitioners to be heterosexual or bisexual. Furthermore, Petitioners did not establish in the proceedings below that they are homosexuals.

Nothing in the record provides a sufficient basis for the Court to decide the constitutional questions on which the Petition for *Certiorari* was granted. For that reason, *amicus* respectfully urges the Court to dismiss the Petition as improvidently granted.

II. PETITIONERS CANNOT SUSTAIN A FACIAL CHALLENGE TO THE STATUTES UNDER THE STANDARD ARTICULATED BY THE COURT IN *U.S. V. SALERNO*; THEREFORE THE DECISION BY THE COURT BELOW SHOULD BE AFFIRMED

[11] *Lawrence v. Texas*, 41 S.W.2d 349, 350 (Tex. App. 2001). *See also* Brief of Petitioners at 3.

Petitioners are making a facial challenge to the statutes. As such, they "must establish that no set of circumstances exists under which the Act would be valid."[12] Petitioners concede that the statutes could be enforced against same-sex sodomy where there is no valid consent, or to same-sex sodomy involving prostitution, or to same-sex sodomy in public view. Each constitutes circumstances under which the statutes could be validly enforced.

Amicus respectfully urges the Court to affirm the decision below.

III. TEXAS PENAL CODE §§ 21.06 AND 21.01 DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Statutes On Their Face Do Not Discriminate On The Basis Of Sex (Gender) Or Sexual Orientation And Apply Equally To Both Sexes.

1. Sexual Orientation:

Amicus contends that Petitioners have no valid basis to raise or sustain a facial challenge to the statutes on equal protection grounds because they did not assert in the proceedings below that they are homosexuals. Furthermore, the statutes are directed at same-sex conduct and not orientation or status.[13] See Section I., *supra*.

[12] *Salerno*, 481 U.S. at 745; *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990) (citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 524 (1987) (O'Connor, J., concurring.)); *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J. dissenting from denial of *cert.*).

[13] *Meinhold v. U.S. Department of Defense* 34 F.3d 1469, 1478 (9th Cir. 1994) (recognizing *Robinson* rule that criminal penalties may be inflicted

The court below correctly concluded: "[W]e cannot assume homosexual conduct is limited only to those possessing a homosexual 'orientation.' Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct. Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation."[14]

A recent survey revealed that the percentage of people having same-sex partners had significantly increased over the prior year for both men and women; however, the number of exclusively homosexual men and women did not change significantly. The author attributed changes to homosexual experimentation by those previously exclusively heterosexual, in the more accepting social climate today.[15]

Bay Windows, self-described as "New England's Largest Gay & Lesbian Newspaper," published an editorial citing "repeated studies of sexuality," which "have found that much of the American public is functionally bisexual over the course of their lifetime, experiencing attraction or engaging in sexual contact with people of both genders."[16]

A very high percentage of bisexual women engage in sex with men, including homosexual men. Dr. Jeanne Marrazzo, an assistant professor of medicine at the University of Washington School of Medicine and nationally recognized expert on lesbian health, states: "About 90

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only if accused has committed act by contrast with status); *Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1991); *Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989).

[14] *Lawrence*, 41 S.W.3d at 353.

[15] A.C. Butler, *Trends in Same-Gender Sexual Partnering*, 1988-1998. Journal of Sex Research 333-343 (visited Feb. 5, 2003): <http://www.mygenes.co.nz/updates.html.

[16] Andrew Rapp, "Try Coming Out as Bisexual" (visited Feb. 3, 2003): <http://www.baywindows.com/main.cfm?include=detail&storyid=341517.

percent of women who have sex with women have been sexually active with men at some point in their lives."[17] Dr. Katherine Fethers, who led an Australian study on bisexual women, reported in *Sexually Transmitted Infections*, a specialty journal published by the *British Medical Journal*:

> Ninety-three percent of the women who reported having sex with another woman also reporting having sex with men within the past year. These bisexual women were found to be more likely than strictly heterosexual women to have injected drugs, had sex with homosexual or bisexual men and had more than 50 male sexual partners in their lifetime.[18]

"Deviate sexual intercourse" is a common occurrence in prisons and is not exclusively homosexual. Prison rape and consensual sex include sex between same-sex heterosexuals, same-sex homosexuals and same-sex bisexuals:

> Because a prison population is highly controlled and inmates no longer have the regular opportunity to engage in consenting heterosexual sex, acting out behaviors pose a grave danger to the safety of other inmates and to staff. [Id., Exs. # 5; Ex. # 20]. Unfortunately, even today, inmates are victimized by sexual assaults from other inmates. Inmates at WSR have been caught engaging in consensual and non-consensual homosexual sex. [Id., Ex. # 5]. Inmates have also been forced into performing fellatio on other inmates. ... The probability or possibility of

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[17] Walter Neary, *All Women Should Be Getting Regular Pap* Tests, Study Shows, University Week July 19, 2001 available at: <http://depts.washington.edu/~uweek/archives/2001.07.JUL_19/_article9.html.

[18] Melissa Schorr, "Bisexual Women More at Risk: May Serve as 'Bridge' to Bring STDs to Their Female Partners," (visited Feb. 7, 2003): <http://abcnews.go.com/sections/living/DailyNews/lesbianstds001023.html.

> inmates engaging in consensual and non-consensual sex with other inmates increases exacerbating the problems with HIV, hepatitis, herpes, and other sexually transmitted diseases. ... Inmates, who are not homosexual, may engage in homosexual acts in order to satisfy their sexual appetite created by the presence of sexually explicit materials.[19]

"[M]ultiple unsolicited and unwanted requests for homosexual sex" is a problem in prisons.[20] "Because of the lack of physical relationships of choice in prison, there is an increased possibility that inmates who view sexually explicit material will engage in consensual and non-consensual homosexual sex, thereby increasing the spread of HIV, hepatitis and other sexually transmitted diseases."[21] "Some complaints were voiced by the inmates at the failure to segregate inmates who are homosexuals or sex deviates from the rest of the population."[22]

Petitioners were prosecuted for engaging in "deviate sexual intercourse." "Deviate sexual intercourse" is conduct pure and simple. It is conduct commonly engaged in by bisexuals and heterosexuals (engaging in homosexual experimentation) who would be subject to the same criminal liability under the Texas statutes as are Petitioners.

According to the American Psychiatric Association, sexual orientation "refers to erotic attraction to males, females, or both."[23] A person's "erotic attraction" is not an

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[19] *See Ford Powell v. Chase Riveland,* 991 F. Supp. 1249, 1251-1253 (W.D. Wash. 1997).

[20] *Brewer v. Hillard*, 15 S.W.3d 1, 7 (Ky. App. 1999).

[21] *Allen v. Wood*, 970 F. Supp. 824, 830 (E.D. Wash. 1997).

[22] *Sas v. Maryland*, 295 F. Supp. 389, 418 (D. Md. 1969).

[23] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders,* Fourth Edition, Text Revision 535 (Washington, DC, American Psychiatric Association, 2000).

element of the offense proscribed and is, therefore, irrelevant.

There is no basis on which the Court should conclude that the statutes discriminate on their face or as applied to Petitioners.

2. Sex (Gender)

The statutes do not discriminate based on sex (gender). They are enforceable against a woman engaging in "deviate sexual intercourse" with another woman and a man with another man. Men and women are treated with absolute equality as persons. The statutes neither advantage nor disadvantage one sex but not the other.

Petitioners and their *amici* construe the statutes as if they permit men to engage in sexual conduct with other men but not women with women. The statutes do not in any way require adherence to or reinforce any such gender stereotypes. The language could not be clearer: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Women and men are treated exactly the same. The statutes are neutral to both sexual orientation and sex (gender).

Even if the word "sex" in the statutes were expanded beyond the dictionary and traditional definition as a biological distinction between male and female, to mean "gender," defined as "personality features and socio-sexual roles typically associated with 'masculinity' or 'femininity,'"[24] there would still be no discriminatory effect.

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[24] *Bibby v. The Philadelphia Coca Cola Bottling Co.*, 85 F. Supp. 2d 515, 517 (E.D. Pa. 2000) (citing *Higgins v. New Balance Athletic Shoe*, 21 F. Supp. 2d 66, 73, 75 (D. Me. 1998)); *Goins v. West Group, Inc.*, 635 N.W.2d 717, 723 (Minn. 2001) (holding that under state's Human Rights Act, an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination, defined as "self-image of gender").

"Gender," in that sense, would apply to both men and women, regardless of their biological distinctions or "orientation."

It is instructive that Congress did not include gender or sexual orientation in Title VII of the Civil Rights Act and the courts have refused to define "sex" beyond its traditional meaning, even after the Court's ruling in *Oncale v. Sundowner Offshore Services, Inc.*[25]

Although the Court used both gender and sex in its opinion in *United States v. Virginia*,[26] ("*VMI*") gender is used only as the biological distinction between men and women, male and female. The Texas statutes are completely consistent with the Court's ruling in *VMI*. Justice Stevens emphasized in *Bray v. Alexandria Women's Health Clinic*,[27] "the capacity to become pregnant is the inherited and immutable characteristic that 'primarily differentiates the female from the male.'"[28]

Even if a facially neutral statute operates to the advantage of one sex over the other, that factor alone is not dispositive of whether the legislature had a discriminatory intent. In *Personnel Administrator of Massachusetts v. Feeny*,[29] an equal protection challenge was made to a Massachusetts statute that created a lifetime preference for veterans who qualified for state civil service positions ahead of any qualifying nonveterans. The preference operated overwhelmingly to the advantage of males. A district court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment and this Court reversed. Because

[25] 523 U.S. 75 (1998).

[26] 518 U.S. 515 (1996).

[27] 506 U.S. 263 (1993).

[28] *Id.* at 330. (Stevens, J. dissenting.)

[29] 442 U.S. 256 (1979).

the statute was gender-neutral on its face, the Court considered first whether the statutory classification was neutral and then whether the adverse effect reflected invidious gender-based discrimination. The Court held that "the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women."[30]

The Texas statutes do not prefer one sex over the other nor do they prefer heterosexuals over homosexuals. The statutes are intended to restrain "deviate sexual intercourse." The Legislature may have concluded that only same-sex "deviate sexual intercourse" could be prohibited in light of the Court's rulings in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*. *See infra*, section III. E.

B. For Equal Protection Purposes, "Deviate Sexual Intercourse" Is Not A Fundamental Right

Because of "the practical necessity that most legislation classifies for one purpose or another,"[31] this Court gives states "wide latitude" in enacting social legislation.[32] To satisfy the Fourteenth Amendment's equal protection guarantee, such legislation need only have "a rational relationship to some legitimate end" as long as it "neither burdens a fundamental right nor targets a suspect class."[33]

[30] *Id.* at 280.

[31] *Romer*, 517 U.S. at 631.

[32] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

[33] *Romer*, 517 U.S. at 631.

This Court has held that to be "fundamental," a right must be either "implicit in the concept of ordered liberty"[34] or "deeply rooted in this Nation's history and tradition."[35] This Court has already held that "neither of these formulations would extend a fundamental right … to engage in acts of consensual sodomy."[36] Such a proposition, this Court said, "is, at best, facetious."[37] Thus the lower court in the present case correctly held that "there is no fundamental right to engage in sodomy"[38] or, in the exact terms of the Texas statute, same-sex "deviate sexual intercourse."

In *Bowers*, this Court held that such an asserted right bears no resemblance to its previously recognized substantive personal rights[39] such as privacy.[40] As defined in the Texas statute, "deviate sexual intercourse" has nothing to do with the privacy of "the home, the family, marriage, motherhood, procreation, and child rearing"[41] that this Court has said the Fourteenth Amendment protects. As the incidents of same-sex sodomy in prisons, *see supra*, and other examples illustrate, many who engage in same-sex sodomy are not involved in or pursing any kind of relationships at all, but merely personal sexual gratification.

Even where a right deemed by this Court to be fundamental is generally involved, legislatures retain

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[34] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

[35] *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

[36] *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

[37] *Id.* at 193.

[38] *Lawrence*, 41 S.W.3d at 357.

[39] *Bowers*, 478 U.S. at 190-91.

[40] *See*, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[41] *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973).

authority to make policy choices. In *Harris v. McRae*,[42] for example, this Court upheld a prohibition on public funding for medically necessary abortions:

> Where, as here, Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard, since, by encouraging childbirth except in the most urgent circumstances, it is rationally related to the legitimate governmental objective of protecting potential life.[43]

Neither does this asserted sexual right find any protection in the privacy of the home recognized in *Stanley v. Georgia*.[44] As this Court explained in *Bowers*, that right was "firmly grounded in the First Amendment."[45] In stark contrast, the asserted right to "deviate sexual intercourse" in the present case, like the asserted right to sodomy in *Bowers*, "has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment."[46]

The present claim would begin an ever-widening series of claims for constitutional protection of various forms of sexual conduct. "Its limits are … difficult to discern. … And … it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed

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[42] 498 U.S. 297 (1982).

[43] *Id.* at 299.

[44] 393 U.S. 557 (1969).

[45] *Bowers*, 478 U.S. at 195.

[46] *Id.*

to prosecution adultery, incest, and other sexual crimes even though they are committed in the home."[47] As in *Bowers*, this Court should be "unwilling to start down that road."[48]

C. For Equal Protection Purposes, Sexual Orientation Is Not A Suspect Class

Even if a legislative classification does not implicate a fundamental right, it may still require more than a "rational basis" justification if it targets a "'suspect' or 'quasi-suspect' class."[49] The Texas statutes at issue here do not discriminate on the basis of sexual orientation, and the record contains no evidence of Petitioners' sexual orientation. Indeed, this Court in *Romer* did not identify homosexuals as a suspect class but applied the rational basis standard.[50] It should do the same in the present case.

This Court has held that classifications targeting a "suspect class" must be "suitably tailored to serve a compelling state interest."[51] To be a suspect class, a group must meet the "traditional indicia of suspectness."[52] It must "have been subjected to discrimination," must "exhibit obvious, immutable, or distinguishing characteristics that

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[47] *Id.*

[48] *Id.* at 196.

[49] *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

[50] *Romer*, 517 U.S. at 632.

[51] *Cleburne*, 473 U.S. at 40.

[52] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

define them as a discrete group" and be "politically powerless."[53]

This Court has consistently identified as immutable characteristics such things as "race, gender, or ethnic background"[54] and "height or blindness."[55] As such, the only classes recognized by this Court as "suspect" are race,[56] alienage,[57] and ancestry.[58] Central to each are the "obvious, immutable, or distinguishing characteristics that define them as a discrete group." Indeed, this Court has held that a "status" defined not by "an absolutely immutable characteristic" but "conscious, indeed unlawful, action" does not qualify as a suspect class.[59]

Lower courts have held, as this Court implied in *Romer*, that homosexuals are not a suspect class for equal protection purposes. The Ninth Circuit, for example, concluded that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from such traits as race, gender, or alienage."[60]

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[53] *Bowen*, 483 U.S. at 602. *See also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Independent School District*, 411 U.S. at 28.

[54] *See*, e.g., *Holland v. Illinois*, 493 U.S. 474,496 (1990); *Lockhart v. McCree*, 476 U.S. 162, 175 (1986).

[55] *Cleburne*, 473 U.S. at 472.

[56] *See Loving v. Virginia*, 388 U.S. 1 (1967).

[57] *See Graham v. Richardson*, 403 U.S. 365 (1971).

[58] See *Korematsu v. United States*, 323 U.S. 214 (1944).

[59] *Plyler v. Doe*, 457 U.S. 202, 220 (1981).

[60] *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563,573 (9th Cir. 1990). *See Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97,102 (D.C. Cir. 1987).

An extensive *National Journal* analysis concluded, "[g]ays and lesbians have achieved unprecedented acceptance in America."[61]

The proliferation of anti-discrimination laws covering sexual orientation demonstrate that "homosexuals are not without political power."[62] Homosexual political action committees raise millions for political candidates.[63] A spokesman for the National Gay & Lesbian Task Force stated: "The Gay vote is large, powerful, and able to swing a closely contested election."[64] *The National Journal* found that homosexuals "use their clout and their dollars to shape laws and social policy."[65]

Open homosexuals are being elected to legislatures[66] and courts[67] and appointed as U.S. ambassadors.[68] According

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[61] Zeller, *Marching On, but Apart*, The National Journal, Jan. 12, 2002.

[62] *High Tech Gays*, 895 F.2d at 574. Last year, according to a leading homosexual publication, Connecticut extended legal rights to same-sex couples and cities prohibiting discrimination against homosexuals included New York City; Takoma, Washington; Dallas, Texas; Westbrook, Maine; Chicago, Illinois; Baltimore, Maryland and Orlando, Florida. *News of the Year*; 2002 Time Line, The Advocate, Jan. 21, 2003.

[63] *See* Lou Chibarro, *A Hard Line On 'Soft Money'* Washington Blade, August 3, 2001.

[64] Lisa Keen, *Groups Tout Clout*, The Washington Blade, Sept. 22, 2000.

[65] *See, supra,* note 61.

[66] The U.S. House of Representatives now has three openly homosexual members.

[67] *See* Lisa Krieger, *Judicial Election Shatters Barrier; First Gay Elected to Superior Court*, San Francisco Examiner, March 28, 1996, at A-9.

[68] President Clinton appointed James Hormel to be Ambassador to Luxembourg and President Bush has appointed Michael Guest to be Ambassador to Romania.

to a leading homosexual publication,[69] significant events during 2002 alone include:

- "The first openly gay candidate to be selected to run with a sitting U.S. governor."
- The majority leader of the Maryland House of Delegates became "the state's first legislator to come out of the closet." "The American Academy of Pediatrics officially endorses adoption by gay people."
- "The … National Education Association adopts a policy asking school districts to protect gay and lesbian students and staff members."
- "[n]ewspapers nationwide, including, most significantly, the New York Times" began running same-sex union announcements.
- Homosexual activists saw only one "Election Day ballot measure defeat" last year.
- "the first openly gay mayor of a U.S. state capital."

Homosexual activist groups themselves claim increasing influence over many aspects of American culture and politics. The Gay & Lesbian Alliance Against Defamation (GLAAD) claims to have "changed the way lesbians and gay men are portrayed on the screen and in the news" and to be "a major source of resources and information for entertainment and news media decision makers. Entertainment Weekly has named GLAAD as one of Hollywood's most powerful entities."[70]

Groups such as the National Lesbian and Gay Journalists Association,[71] Gay and Lesbian Medical

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[69] *News of the Year*, *supra* note 62.

[70] GLAAD, "Our History," available at http://www.glaad.org/about/history.php.

[71] At an NLGJA event on April 12, 2000, longtime member Richard Berke, national correspondent for the New York Times, said, "literally three-quarters of the people deciding what's on the [New York Times']

Association, National Gay and Lesbian Chamber of Commerce, National Organization of Gay and Lesbian Scientists and Technical Professionals, Servicemembers Legal Defense Network, and the Gay, Lesbian & Straight Education Network are a few of the homosexual organizations targeting specific sectors of society.

A recent GLAAD report claimed, "[i]n mainstream and gay media gay consumers are becoming big business."[72] According to Online Partners, owners of the Web portal gay.com,[73] homosexuals represent a $450 billion market.[74] The *Miami Daily Business Review* reports that homosexuals have "extraordinarily high disposable income, and are very attractive target for advertisers."[75]

Clearly, Petitioners are not part of a suspect class. Neither do Petitioners constitute a quasi-suspect class. This Court has held that classifications based on sex (gender) must meet a "heightened standard,"[76] that is, be "substantially related to a sufficiently important government

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front page are not-so-closeted homosexuals." *See* Peter LaBarbera, *Just How 'Gay Is The New York Times*, available at http://www.cultureandfamily.org/articledisplay.asp?id=3249&department=CFI&categoryid=cfreport.

[72] Katherine Sender, *"Business, not Politics": Gays, Lesbians, Bisexuals, Transgender People and the Consumer Sphere* (GLAAD Center for the Study of Media and Society, 2002), at 4.

[73] Online Partners boasts that "According to DoubleClick's @plan research, Gay.com is the #1 site on the Internet in reaching single men with household incomes over $100,000." http://www.onlinepartners.com/pages/market.html.

[74] Selig Center for Growth, University of Georgia, available at http://www.onlinepartners.com/pages/market.html.

[75] Marcia Philbin, *Branching Out*, Miami Daily Business Review, Oct. 6, 2000, p. A13.

[76] *Cleburne*, 473 U.S. at 440.

interest."[77] The Texas statute at issue here, of course, is entirely gender-neutral, applying equally to same-sex "deviate sexual intercourse" by men and by women and without regard to sexual orientation.

The court below also rejected Petitioners' disproportionate impact argument: "Where, as here, a statute is gender-neutral on its face, appellants bear the burden of showing the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose."[78]

The court went on to cite this Court's decision in *Washington v. Davis*[79] with respect to disproportionate impact. That decision, however, addressed disproportionate impact in the context of racial discrimination. "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[80]

The court below rightly recognized the weakness of Petitioners' argument:

> A fallacy of "amphiboly": sex in the sense of gender is not the same as sex act as distinguishing heterosexual conduct from homosexual conduct. … Appellants complain only that the statute has had a disparate impact between homosexuals and heterosexuals; this simply does not raise the specter of gender-based discrimination.[81]

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[77] *Id.*

[78] *Id.* at 359.

[79] 426 U.S. 229 (1976).

[80] *Id.* at 239.

[81] *Lawrence*, 41 S.W.3d at 358.

In *Baker v. Nelson*,[82] petitioners, both adult males, sought a license to marry, which was denied because petitioners were of the same sex. On appeal to the Minnesota Supreme Court, they argued, "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."[83] The Minnesota Supreme Court stated that it did "not find support for them in any decisions of the United States Supreme Court." Citing *Skinner v. Oklahoma*,[84] the court reasoned, "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[85] The court distinguished racial discrimination from sexual discrimination: "But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.[86]

As Justice White cautioned, the Court should remain unwilling to go down a road that would inevitably lead the Court to face equal protection claims raised by individuals who engage in other types of sexual conduct (paraphilias), such as pedophilia or zoophilia,[87] which some characterize as a "sexual orientation."

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[82] 191 N.W.2d 185 (Minn. 1971).

[83] *Id.* at 186.

[84] 316 U.S. 535 (1942).

[85] *Id.* at 540.

[86] *Baker,* 191 N.W.2d at 187. *See also McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down a Florida criminal statute, which proscribed and punished habitual cohabitation only if one of an unmarried couple was white and the other black.)

[87] American Psychiatric Association, *supra* note 23 at 566-582. *See* Appendix.

It is conceivable that the paraphilias defined in note 87, which are presently classified as "mental disorders" will be declassified just as the American Psychiatric Association declassified homosexuality as a "mental disorder" in 1973.[88]

In the Foreword to "Male Intergenerational Intimacy," published in *The Journal of Homosexuality,* Dr. Gunter Schmidt writes: "Each individual case must be looked upon on its own merits...the threat to make all pedophile acts punishable by law can barely be labeled civilized...it implies discrimination and persecution of a minority and should be abolished."[89] Pedophile activists describe their "paraphilia" as a sexual orientation: "Pedophilia is a sexual-orientation, like heterosexuality, homosexuality, bisexuality, etc."[90] *The Washington Times* reported that the University of Massachusetts at Amherst had revised its nondiscrimination policy to protect "persons whose sexual orientation includes minor children as the sex object."[91]

In 1997, *The New York Times* reported on a growing phenomenon called "polyluv," in which three or more people form "sexual relationships" Because jealousy is still a problem, organizations devoted to group sex such as Loving More use exercises "in which you practice feeling glad that your mate is with another.... Some have even 'married,' with as many as six figures on the wedding cake."[92] Individuals

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[88] Ronald Bayer, PhD, *Homosexuality and American Psychiatry: The Politics of Diagnosis* 3-4 (New York: Basic Books 1981).

[89] Gunter Schmidt, D.Phil., *Male Intergenerational Intimacy*, J. HOMOSEXUALITY, Vol. 20, nos. 1/2, 1990, at 4.

[90] "The Pedophilia/Pedophile Education Web Site Mirror" (visited Feb. 5, 2003:<http://lege.cz/win.en/archiv/pedo1.htm.

[91] *PC 101*, Wash. Times, May 27, 1992, at B1.

[92] *They Call it Polyluv*, N.Y. Times Magazine, Feb. 16, 1997, Section 6, at 15.

engaging in "polyluv" "relationships" could make the same claim that their "private consensual adult behavior" deserves constitutional protection as Petitioners herein make.

D. Protecting Public Morals, Health and Safety Is A Rational, If Not Compelling Reason, To Prohibit "Deviate Sexual Intercourse"

The Court's decisions in *Griswold* establishing a fundamental privacy protecting marital intimacy and its holding in *Eisenstadt v. Baird*,[93] that there was no rational reason for the dissimilar treatment of married and unmarried persons who were similarly situated, should not be extended to same-sex sodomy.

The fact that Texas does not criminalize opposite sex sodomy should not be construed as bias or animus toward homosexuals. It is entirely rational to presume that the Texas Legislature's decision to decriminalize opposite sex sodomy in 1973 was a response to this Court's rulings in *Griswold* and *Eisenstadt,* and to protect marital intimacy and opposite sex relationships that are likely to result in marriage. The Legislature's decision is certainly rational in light of Justice Stevens' dissent in *Bowers*:

> Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms,' *Griswold*, 381 U.S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U.S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct

[93] 405 U.S. 438 (1972).

> proscribed by § 16-6-2 of the Georgia Criminal Code.[94]

The fact that the prohibited conduct is called "deviate" should not be construed as evidence of legislative animus or bias toward homosexuals. Historically and currently, juries are instructed that in judging obscenity they may find that the prurient appeal requirement is met if the material is designed for and primarily disseminated to a clearly defined deviant sexual group including homosexual conduct. Justice Brennan writing for the Court in *Mishkin v. New York*[95] referred to material "depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, ..."[96]

Whenever the state regulates conduct for the sake of public morality, it is a policy-based determination made by the legislature that the conduct in question addresses, thereby affecting the morality of the citizens of that state. It is perfectly valid for the state to make a legislative decision that reflects a deeper moral choice. Thus, the concern for the public morality is not limited to nonconsensual conduct or conduct that occurs in public. "Public morality" should be construed to mean the morality of the public, not merely morality in public. As noted above, unless the conduct is protected by some constitutional right, it may be validly proscribed by the state's police power.

[94] *Bowers*, 478 U.S. at 218 (Stevens, J. dissenting.).

[95] 383 U.S. 502 (1966).

[96] *Id.* at 508. *See Hamling v. United States*, 418 U.S. 87 (1974) ("consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups.) *Id.* at 128; *Pinkus v. United States*, 436 U.S. 293 (1978); *U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied sub nom. Thomas v. United States*, 519 U.S. 82 (1996); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

The purpose of the "deviate sexual intercourse" law is to encourage moral behavior,[97] i.e., that which is productive, healthy, or otherwise beneficial for the individual or society and to discourage immoral behavior.

This Court has also recognized that a state may validly exercise its police power in the interest of public health and safety.[98] This is especially important in the advent of the HIV/AIDS epidemic and the explosion of other sexually transmitted diseases.

States are struggling to find a way to reduce the rapid spread of disease, and many experimental measures have been tried.[99] It has been proposed that the HIV/AIDS crisis has a much greater impact on homosexuals and intravenous drug users.[100] If the tide of this epidemic is to be turned, then such "high risk" behavior must become the focal point of concern.

The liberal magazine *Rolling Stone* published an article in which the author describes a disturbing and deadly trait of homosexual men known as "bug chasers" — homosexual men who yearn to get infected with the HIV virus. "The men who want the virus are called 'bug chasers,'

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[97] *See Bowers*, 478 U.S. at 192.

[98] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) and *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

[99] *See* Comment, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 631-34 (1986).

[100] *See* UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, REVIEW OF THE PUBLIC HEALTH SERVICES RESPONSE TO AIDS 6 (WASH., D.C.) (pub. No. OTA- TM-H-24) (Feb. 1985).

and the men who freely give the virus to them are called 'gift givers.' … HIV-infected semen is treated like liquid gold."[101]

A closely related high-risk behavior by men who have anal sex with other men is a further compelling reason for Texas to criminalize same-sex sodomy. The prevalence and popularity of "barebacking" (unprotected anal sex) greatly increases the risk of HIV and sexually transmitted disease infections.[102]

The fact that incidents of "bug chasing" and "barebacking" are consensual and occur in a private residence does nothing to mitigate the serious threat to both the health and safety of the persons who engage in the conduct and to the public generally. The Texas Legislature's decision to prohibit "deviate sexual intercourse" serves a substantial if not compelling state interest to protect public morality, health and safety.

E. Absent An Express Constitutional Violation, Courts Should Defer To State Legislative Acts Such As §§ 21.06 and 21.01

The Texas Legislature acted within its police power authority to criminalize conduct it considers to be "deviate sexual intercourse." Justice Holmes stated:

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[101] Gregory A. Freeman, *In Search of Death*, Rolling Stone, Feb. 6, 2003, at 45; *See* Matthew Laza, *Men Who Want Aids*, The Spectator, Feb. 1, 2003:<http://www.spectator.co.uk/article.php3?table=old&section=current&issue=2003-02-01&id=2744; *Russian Roulette: The Story Behind the Story* (CBC television broadcast, Nov. 21, 2001) available at<http://www.cbc.ca/disclosure/archives/0111_russianroulette/behindstory.html.

[102] Terry Beswick, *Bareback 'Outings' Spark Debate Over Well-Known Secret*, The Bay Area Reporter, July 27, 2000, available at:<http://www.aegis.com/news/bar/2000/BR000705.html. A World Wide Web search on Feb. 8, 2003, utilizing the "Google" search engine and the term, "bareback sex," produced links to 31,000 Web sites.

> [T]he proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.[103]

Justice Douglas writing for the Court in *Griswold*, *supra*, stated, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[104] "The traditional police power of the states is defined as the authority to provide for the public health, safety, and morals. A legislature can legitimately act on such a conclusion to protect the social interest in order and morality."[105] "As Mr. Chief Justice Warren stated, there is a 'right of the Nation and of the States to maintain a decent society".[106] "Above all we must remember that this Court's power of judicial review is not 'an exercise of the powers of a super-legislature.'"[107] Justice Brandeis wrote to emphasize the importance of judicial restraint: "Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged."[108]

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[103] *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (dissenting opinion joined in by Brandeis, J.).

[104] *Griswold*, 381 U.S. at 482.

[105] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

[106] *Paris*, 413 U.S. at 59.

[107] *Dennis v. United States*, 341 U.S. 494, 526 (1951) (quoting Brandeis, J. dissenting in *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924)).

[108] *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting.).

This Court has affirmed the states' rights to define and protect morality:

> 'In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' ... 'We do not sit as a super legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.'[109]

The fact that the prohibited conduct occurs in private by consenting adults is not a sufficient basis to grant it constitutional protection. "Most exercises of individual free choice--those in politics, religion, and expression of ideas--are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society."[110]

> Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take. ... The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults.' Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision.[111]

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[109] *Paris*, 413 U.S. at 61, 64.

[110] *Id.* at 63, 64.

[111] *Id.* at 68, 69.

Justice Black emphasized the importance of restrained judicial review of legislative enactments:

> My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational.[112]

To invalidate a law, not because it is unconstitutional, but merely because it reflects a moral decision on the part of the legislature, is to deprive the states of their constitutional right to regulate the conduct of their citizens. To strip the state of the moral dimension of its police power is to render the state helpless in controlling and confronting conflicts for which its citizens expect a remedy.

CONCLUSION

For all of the foregoing reasons, Amicus respectfully requests this Honorable Court to dismiss the *Petition for Certiorari* as improvidently granted, or in the alternative to affirm the decision of the court below.

February 13, 2003 Respectfully submitted,

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[112] *Griswold*, 381 U.S. at 520, 521 (Black, J. dissenting.).

APPENDIX

APPENDIX

1. Pedophilia: "sexual activity with a prepubescent child (generally age 13 years or younger). The individual with Pedophilia must be age 16 years or older and at least 5 years older than the child. For individuals in late adolescence with Pedophilia, no precise age difference is specified, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account." (571)
2. Transvestic fetishism: "cross-dressing by a male in women's attire." (574)
3. Autogynephilia: "sexual arousal is produced by the accompanying thought or image of the person as a female". (574)
4. Voyeurism: "obtaining sexual arousal through the act of observing unsuspecting individuals, usually strangers, who are naked, in the process of disrobing, or engaging in sexual activity." (575)
5. Exhibitionism: "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the exposure of one's genitals to an unsuspecting stranger." (569)
6. Fetishism or Sexual Fetishism: "intense sexually arousing fantacies, sexual urges, or behaviors involving the use of nonliving objects (e.g. female undergarments)." (570)
7. Zoophilia: becoming excited by and/or engaging in sexual activity with animals. (576)
8. Sexual sadism: "recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person." (574)

9. Sexual Masochism: "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the act (real, not simulated) of being humiliated, beaten, bound, or otherwise made to suffer." (573)
10. Necrophilia: sexual arousal and/or activity with a corpse. (576)
11. Klismaphilia: erotic pleasure derived from enemas. (576)
12. Telephone Scatalogia: the compulsion to utter obscene topics over the phone. (576)
13. Urophilia: sexual arousal associated with urine. (576)
14. Coprophilia: sexual arousal associated with feces. (576)
15. Partialism: "sexual arousal obtained through exclusive focus on part of the body." (576)
16. Gender Identity Disorder: "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex," along with "persistent discomfort about one's assigned sex or a sense of the inappropriateness in the gender role of the sex." (576)
17. Frotteurism: "touching and rubbing against a nonconsenting person." (570)

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NO. 02-102

IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

vs.

STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF OF THE CENTER FOR MARRIAGE LAW IN SUPPORT OF RESPONDENT

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NO. 02-102

IN THE
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JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

vs.

STATE OF TEXAS,

Respondent.

MOTION OF THE CENTER FOR MARRIAGE LAW FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT

The Center for Marriage Law would like permission from the Court to file the attached amicus brief in the above matter. The Center for Marriage Law is a non-profit 501(c)3 corporation specializing in issues related to one man/one woman marriage seeking to uphold one man/one woman marriage. Counsel for the Center for Marriage Law, Vincent P. McCarthy, sought permission from LAMBDA to file this brief but was denied because said request was made on stationery for the American Center for Law and Justice. The Center for Marriage Law has no relationship to the American Center for Law and Justice and new stationery for the Center for Marriage Law had not yet arrived. Despite counsel for LAMBDA'S belief that this brief is duplicative of another brief filed by the American Center for Law and Justice in this matter the Center for

Marriage Law assures this court that no part of the brief was written by anyone employed by the American Center for Law and Justice.

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QUESTIONS PRESENTED

1. Whether this Court should dismiss the writ of certiorari as improvidently granted in light of the extreme paucity of the record?

2. Whether the Due Process Clause of the Fourteenth Amendment renders facially unconstitutional a state law prohibiting extramarital sexual activity, specifically same-sex sodomy?

3. Whether the Equal Protection Clause of the Fourteenth Amendment renders facially unconstitutional a state statute prohibiting same-sex sodomy?

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INTEREST OF AMICUS CURIAE

The Center for Marriage Law is an organization established to preserve and defend the male-female institution of marriage through public policy research, litigation, and educational efforts regarding the central role of marriage in American society.[1] The Center is deeply anxious that nothing in this Court's decision establish precedent that would weaken the legal status of marriage and the family.

SUMMARY OF ARGUMENT

What petitioners in this case seek is to establish a precedent that would undermine laws that recognize and protect the unique, exclusive social value and benefits of marriage. Much more is at stake than a mere sodomy law. The petitioners seek to establish a constitutional principle that will profoundly influence public policies concerning a host of family related issues.

Establishing a principle such as petitioners seek based on the paucity of facts in this case is extremely unwise. Further, this Court should be cautious about any decision that would affect the unique constitutional status of marriage and the laws and policies of many jurisdictions. A more appropriate response to petitioners request is to defer to the democratic process which would protect the crucial constitutional interests at stake.

ARGUMENT

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. Written consent of Respondents to the filing of this brief has been filed with the Clerk of this Court. Petitioners denied consent as indicated in the attached motion.

I. THE RECORD IN THIS CASE IS INSUFFICIENT TO SUPPORT A DECISION ON THE MERITS.

This case presents an inapt vehicle for the Court's judgment on the controversial public policy questions raised by Petitioners, providing the Court with virtually no factual record upon which to rest a decision. As this Court has often held, absent a sufficient record, the Court should dismiss the writ of certiorari as improvidently granted. *Ellis v. Dixon*, 349 U.S. 458, 464 (1955) *citing International Brotherhood of Teamsters v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Such dismissal is appropriate in this case.

Petitioners' argument is premised heavily on the proposition that the Petitioners were prosecuted for engaging in "private, consensual sexual relations." *See, e.g.*, Pet. Brief at 11-18. The evidentiary record, however, establishes only that the Petitioners were adult males discovered engaging in "deviate sexual conduct, namely, anal sex," in violation of Texas Penal Code § 21.06 (hereinafter "section 21.06"). Pet. App. 129a. In seeking to bring an "as applied" challenge, Petitioners presented no evidence (a) that the sexual acts were consensual, (b) that either or both Petitioners had capacity to consent (c) that the acts were private, or (d) that they were noncommercial. The record is devoid of any evidence which would give this Court a basis to decide the substantive issues in this case.[2]

---

[2] Allegations contained in Petitioners' motion to quash were not supported by evidence and do not satisfy the Petitioners' evidentiary burden. "The proponent of a motion to quash the indictment has the burden of proof and may offer proof of the allegations in the motion to quash." *State v. Perez*, 948 S.W.2d 362, 364 (Tex. Crim. App. 1997).

Petitioners attempt to paper over this procedural defect by shifting the burden of proof to the Respondents. Pet. Brief at 3. The State's duty in prosecution, however, is only to prove the elements of the crime charged. Tex. Code Crim. P. Ann. art. 38.03 (West 2002). Additional facts cannot be inferred from the State's failure to prove *non-elements*. Because section 21.06 applies to all deviant sexual intercourse between persons of the same sex, proof that the Petitioners' conduct was non-consensual, commercial or public would have been superfluous to the state's prosecution under Section 21.06. There is simply no evidence in the record to support Petitioners' challenge to the constitutionality of section 21.06 *as applied to private, consensual, non-commercial sexual activity.*

In the absence of a sufficient record to support Petitioners' challenge to Section 21.06, this case must be viewed, at best, as a facial challenge to the statute. *Lawrence v. Texas*, 41 S.W.2d 349, 350 (Tex. Ct. App. 2001) ("[T]he facts and circumstances of the offense are not in the record. . . . Thus, the narrow issue presented here is whether Section 21.06 is facially constitutional."). Pursuant to this Court's ruling in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987), a party bringing a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *See also Troxel v. Granville*, 530 U.S. 57, 85 (Stevens, J., dissenting) ("I believe that a facial challenge should fail whenever a statute has 'a "plainly legitimate sweep."'"). Petitioners do not dispute that the statute would be valid as enforced against public or commercial sexual activity. Pet. Brief at 6, 39-40. Having conceded that the Act would be valid under some circumstances, Petitioners' facial challenge must fail.

II. THE COURT SHOULD AVOID ANY HOLDING WHICH WOULD UNDERMINE MANY STATE LAWS PROTECTING

MARRIAGE AND THE TRADITIONAL FAMILY STRUCTURE.

Without explicitly challenging the Texas marriage law, Petitioners and their amici have advanced arguments which could significantly undermine state laws regulating marriage. As noted below, every state, with the partial and recent exception of Vermont,[3] elevates marital relationships over all other domestic relationships. This historically unanimous preference for marriage would be called into question were this Court to hold that there exists either a fundamental right to engage in sodomy, or a constitutional equivalence between same-sex and opposite-sex unions.

Petitioners seek to effectively, though indirectly, undermine marriage by constitutionalizing a perceived social change: "Today, the prevalence and widespread acceptance of extramarital sex and birth control, accompanied by heightened respect for reproductive privacy, have rendered anachronistic the conception of marriage as a regulator of sex." Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089, 1089 (2002). This aim is inappropriate because of the unique constitutional status of marriage premised on its unparalleled contribution to society.

A vigorous public debate over the nature and definition of marriage is currently taking place in American homes, workplaces, places of worship, town halls, statehouses, and courtrooms. This marriage debate involves fundamental questions of social pluralism, limited government, and core world views. Petitioners seek to end that debate and

[3] In 2000, the Vermont Legislature enacted a "civil unions" law granting same-sex couples who register their civil union all the benefits of marriage. Vt. Stat. Ann., tit. 15, § 1201, et seq. (2002). Even under Vermont law, however, marriage remains the union of one man and one woman. Vt. Stat. Ann., tit. 15, § 8 (2002).

circumvent by judicial decree, the consensus-building process of legitimate, democratic self-government.

A. Marriage is the primary institution for regulating sexual behavior.

Marriage is the primary social institution for regulating sexual behavior. "All societies . . . control sexual behavior in some manner; the two most universal forms of control appear to be the incest taboo and marriage. . . . Sex outside of marriage, unlike sex before marriage, is *not* permitted in a majority of societies." Bert N. Adams, *The Family: A Sociological Interpretation* 188-89 (1986). The state strives to channel sexual behavior into marriage, for that is the relationship and bonding environment in which sexual love can most safely and responsibly be expressed. The primary means is by direct regulation of marriage, but supporting and reinforcing are a host of laws including criminal and civil laws that prohibit and regulate nonmarital sexual behavior. As two reknowned historians put it: "[S]ex is a river of fire that must be banked and cooled by a hundred restraints if it is not to consume in chaos both the individual and the group." Will Durant & Ariel Durant, *The Lessons of History* 35 - 36 (1968).

Marriage "strengthens the social interest in channeling and limiting procreative sexual behavior to responsible relationships of parental commitment and complementarity. More clearly than any other institution, traditional male-female marriage clearly links sexual behavior with child rearing through procreation. It provides a bright line for relationships of intimacy. It provides a clear, well-established, universally respected standard for allocating parental responsibility." Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. L. & Pub. Pol'y 771, 794 (2001). Marriage, moreover, conforms to

powerful, intuitive social mores linking marriage, sexual relations, and procreation.

Society has compelling interests in protecting the social institution – marriage – that has best furthered social interests in responsible sexual behavior, and in preserving the linkage that institution forges among sex, procreation, and child rearing.

The social connection linking marriage and sexual behavior is as old as marriage itself. Plato proposed that "marriage laws [be] first laid down" and that "a penalty of fines and dishonor" be imposed upon all who did not marry by certain ages because "intercourse and partnership between married spouses [is] the original cause of childbirths." Plato, *The Laws of Plato* 108-109, 161 (Thomas L. Pangle trans., University of Chicago Press 1980). Similarly, concern about the linkage between marriage and responsible sexual behavior and procreation was one of the major purposes for marriage regulation in Roman law. Susan Treggiari, *Roman Marriage: Justi Coniuges From the Time of Cicero to the Time of Ulpian* 5-11 (1991). During the centuries following the Roman era, the primary intellectual justification for prioritizing marriage and marriage regulations has remained the fostering responsible sexual intercourse and reproduction. Locke linked "the increase of Mankind, and the continuation of the Species in the highest perfection," with "the security of the Marriage Bed, as necessary thereunto." John Locke, *Two Treatises of Government* 183 (Cambridge Univ. Press 1988) (1690).

The history of marriage law could be viewed primarily as the history of the regulation of sex, procreation, and child rearing, for those concerns have long outweighed such modern (and postmodern) interests as romantic love, companionate equality, interspousal intimacy, and economic maximization as the core societal concerns regarding marriage. *See generally* Will Durant, *The Reformation: A*

History of European Civilization from Wyclif to Calvin: 1300-1564 at 303 (1957) ("Love was considered a normal result, not a reasonable cause, of marriage."); Mary Ann Glendon, *The Transformation of Family Law passim* (1989); William J. Goode, *World Revolution and Family Patterns* 38 (1963); Lawrence Stone & Jeanne Stone, *An Open Elite? England 1540-1880* at 122 (1984); *Sex in the West,* The New Republic, July 8, 1985, at 25, 32.

Even today, channeling sexual behavior remains a primary purpose of marriage in our society. As one prominent American community puts it: "Marriage is the uniting of one man and one woman in covenant commitment for a lifetime. It is God's unique gift to reveal the union between Christ and His church, and to provide for the man and the woman in marriage the framework for intimate companionship, the channel for sexual expression according to biblical standards, and the means for procreation of the human race." *The Baptist Faith and Message* (revised by the Southern Baptist Convention, June 10, 1998) <http://www.sbcnet.org/bfm18.htm>.

B. This Court has extended constitutional significance to the institution of marriage as the primary institution to foster responsible sexual behavior.

This Court has long recognized a "right to marry." Although the existence of such a right was intimated as early as 1923 in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the first case to uphold the right to marry was *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, the Court overturned the criminal convictions of a couple who had violated Virginia's anti-miscegenation laws. Subsequent cases have reiterated the fundamental constitutional importance of marriage. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

In many cases, this Court has noted the social importance of the marriage relationship, on which rests its constitutional status. *Meister v. Moore*, 96 U.S. 76, 81 (1877); *Reynolds v. United States*, 98 U.S. 145, 165-166 (1878).

As this Court noted 118 years ago, states have a clear and legitimate right to promote marriage as an important state interest.

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

Nearly forty years ago, this Court noted that marriage is a social institution which predates even the creation of our Constitution and Bill of Rights:

> We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

Similarly, this Court has recognized the connections between procreation, the right to marry, and the regulation of nonmarital sexual activity.

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection and, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relationships legally to take place.

Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

As recently as 2001, this Court recognized the social value of marriage in upholding an immigration paternity rule which imposed a greater burden of proof on unwed fathers than on either married fathers or on mothers, *Nguyen v. I.N.S.*, 533 U.S. 53 (2001). *See also*, *United States v. Virginia*, 518 U.S. 515, 522 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946): "The two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.")

i. Marriage is the fundamental element of American democratic society.

As one commentator has noted, "Through the commitments of marriage and kinship both children and parents experience the need for and the value of authority, responsibility, and duty in their most pristine forms." Bruce

C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests* 81 Mich. L. Rev. 463, 476 (1983). He also notes that "Marriage alone plays a critical role in the democratic structure by interposing a significant legal entity between the individual and the State." *Id.* at 483.

Thus, the constitutional status of marriage and the marriage-based family, which is unique to those institutions, is justified by the singular benefit they confer on our political system. In recommending passage of the federal Defense of Marriage Act, The Report of the Committee on the Judiciary of the House of Representatives noted a recent report of the Council of Families in America which stated:

> The enormous importance of marriage for civilized society is perhaps best understood by looking comparatively at human civilizations throught history. Why is marriage the most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generating continuity.
>
> . . . .
>
> Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children.

Defense of Marriage Act, Rep. 104-664, Comm. on Judiciary, 104th Cong., 2d Sess., July 9, 1996, at 13-14.

ii. Marriage is the optimal setting for procreation and child rearing.

Similarly, the marriage-based family provides the ideal setting in which children may be both born and reared because, "the commitments inherent in formal families do

increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment." Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests* 81 Mich. L. Rev. 463, 475-476 (1983).

In the context of citizenship requirements, this Court has recognized as "important governmental objectives" (1) "assuring that a biological parent-child relationship exists" and (2) ensuring a potential for the development of "not just a relationship that is recognized as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent." *Nguyen v. I.N.S.*, 533 U.S. 53, 62 & 64 (2001).

These important interests are uniquely advanced by a preference for sexual relations within marriage because a child conceived as a result of the relationship between married parents is legally guaranteed some kind of relationship to both of his or her parents. A sexual relationship outside of marriage that results in conception of a child brings with it no such guarantee. A sexual relationship with no possibility of procreative potential is even farther removed from these interests.

C. Texas law endorses and affirmatively prefers sexual relations within marriage

The Texas legislature has recognized marriage as the only institution within which sexual activity is licensed and affirmatively endorsed. Tex. Fam. Code Ann. § 2.001(a) (West 2002). In 1973, the same year in which section 26.01 was enacted, the Legislature also adopted the precursor to

the current Texas Family Code § 2.001, providing that marriage licenses may be granted only to male-female unions. Acts 1973, 63rd Leg., p. 1596, ch. 577, § 1.

If the Texas Legislature believes, as this Court has indicated, that the male-female union of marriage is the foundation upon which social relations, social obligations and duties, and the principles of American government rest, it is fully reasonable for the Legislature to prefer marriage over same-sex unions. *Reynolds v. United States*, 98 U.S. 145, 155-56 (1878). Moreover, because of the stability needed to provide a secure environment for children, and to minimize confusion in the ordering of economic unions, the Legislature also saw fit to prefer marriage over nonmarital opposite-sex unions.

Among the legal responsibilities of marriage is the duty of a married individual to provide support for his or her spouse. Texas Fam. Code Ann. § 2.501(a) (West 2002) establishes a legal duty between spouses for the mutual support of each other. Section 2.501(b) goes on to establish a married person's civil liability to third parties who provide necessaries to that person's spouse. Tex. Fam. Code Ann. § 2.501(b) (West 2002). Similarly, because Texas is a community property state, all property acquired by either spouse during the marriage is presumed to be community property, jointly held by each spouse in an undivided one-half interest. Tex. Fam. Code Ann. § 3.003 (West 2002).

Furthermore, a married person is subject to statutory limitations upon his or her ability to transfer property upon death or dissolution of the marriage. Upon dissolution, Texas law requires that the property of the spouses be equitably divided between them, taking into consideration the rights of each party and of any children of the marriage. Tex. Fam. Code Ann. § 7.001 (West 2002). Upon death, the deceased spouse may devise no more than one-half of his or her

community estate to a third party, as the surviving spouse maintains a one-half interest in the estate.

On the basis of this legal relationship, the Texas legislature has also assigned a number of legal benefits which recognize and promote the family relationship created through marriage. Among the intangible benefits recognized in Texas law are the right of spousal privilege and confidential communications, Rule 504, Tex. Rules of Evidence (2002), and the right to decide final disposition of a spouse's body, Tex. Health and Safety Code Ann. § 711.002 (West 2002).

Examples of more quantifiable benefits available under Texas law include health insurance benefits, *e.g.*, Tex. Ins. Code Ann. § 1551.004 (West 2002) (definition of covered dependents of state employees), Tex. Ins. Code Ann. § 1575.003 (West 2002) (definition of dependents of public school system employees); retirement and survivor benefits, *e.g.*, Tex. Gov't Code Ann. § 615.073 (West 2002) (public employee survivor health benefits), Tex. Rev. Civ. Stat. Ann. art. 6243a-1 (West 2002) (police and fire personnel pensions), Tex. Rev. Civ. Stat. Ann. art. 6243e (West 2002) (local fire fighters retirement act); workers compensation benefits, Tex. Lab. Code Ann. §§ 408.182-.183 (West 2002), wrongful death benefits, Tex. Civ. Prac. & Rem. Code Ann. § 71.004 (West 2002), intestacy rights, Tex. Prob. Code Ann. § 45 (West 2002), presumptive right of community interest in property held at dissolution, Tex. Fam. Code Ann. § 3.003 (West 2002), and the right of spousal support, Tex. Fam. Code Ann. § 2.501(a) (West 2002).

Overall, 1429 provisions of the Texas Code contain the words "marriage," "spouse," "husband," or "wife." Though not all of these statutory sections confer actual benefits or responsibilities upon married couples, the volume of references to marriage and married relationships indicates the central role which marriage plays in Texas law.

In contrast, the Texas legislature extends no formal recognition of unmarried domestic partnerships as a family status or legal relative. Rather, the legislature has clearly articulated that "[a] member of a civil union or similar relationship entered into in another state between persons of the same sex is not a spouse." Tex. Fam. Code Ann. § 3.401(5) (West 2002). Similarly, title 8 of the Texas Government Code, governing public retirement systems, states:

> For purposes of this title, the state may not give effect to a: (1) public act, record, or judicial proceeding that recognizes or validates a marriage or civil union between persons of the same sex; or (2) right or claim asserted as a result of the purported marriage or civil union.

Tex. Gov't Code Ann. § 810.001(h) (West 2002).

All four sections of Texas code containing the phrase "domestic partnership" refer to a business relationship under the Texas Revised Limited Partnership Act and the Texas Revised Partnership Act. Tex. Rev. Civ. Stat. Ann. art. 6132a-1 (West 2002); Tex. Rev. Civ. Stat. Ann. art. 6132b-9.02 (West 2002); Tex. Rev. Civ. Stat. Ann. art. 6132b-9.03 (West 2002); Tex. Rev. Civ. Stat. Ann. art. 6132b-9.05 (West 2002).

D. Section 21.06 is part of an incremental system channeling sexual activity into marriage and minimizing sexual activity outside of marriage.

Not only has the Texas legislature adopted a system of laws to strengthen and preserve marital unions, but the Legislature has also adopted an incremental statutory system which expresses its preference for marriage as the relationship within which sexual activity is to exist. This system may be viewed as an effort to draw Texas couples

into the institution of marriage wherever possible, while at the same time discouraging and/or prohibiting sexual conduct outside of marriage.

While Petitioners present section 21.06 as a law unique in its application and scope, singling out a particular class of people, the Texas legislature has sought to discourage all unmarried sexual relationships. Texas Education Code § 28.004 requires that Texas schools teach abstinence as the preferred mode of conduct for unmarried students, urging students to practice "abstinence from sexual activity before marriage." Tex. Educ. Code Ann. § 28.004 (West 2002). Notably, the state policy discouraging sexual activity among students is clearly couched in the context of marriage. Similarly, in teaching students how to avoid HIV infection, schools are to teach students "the value of abstinence and long-term mutual monogamy." Tex. Educ. Code Ann. § 51.919 (West 2002).

In the Texas Public Health Code, materials used in teaching minors are to "emphasize sexual abstinence before marriage and fidelity in marriage as the expected standard in terms of public health." Tex. Health & Safety Code Ann. §85.007(b)(1) (West 2002). The Legislature proceeded to state that "abstinence from sexual intercourse outside of lawful marriage is the expected societal standard for school-age unmarried persons." Tex. Health & Safety Code Ann. § 163.001 (West 2002).

Texas law expresses its disapproval of all non-procreative sexual conduct by maintaining a general definition of "deviate sexual intercourse." Tex. Penal Code Ann. § 21.01(1) (West 2002). Thus, sexual activity involving objects, the mouth, or the anus is uniformly classified as "deviate" under Texas law. A dictionary definition of "deviate" suggests that "deviate" conduct is that which "departure from an accepted norm." *Random House Webster's College Dictionary* 370 (1991), Thus, all "deviate

sexual conduct" is a departure from the accepted norm in Texas, whether between two persons of the same sex or two persons of the opposite sex. These and other sections of Texas law make it clear that the Legislature disapproves both of "deviate sexual conduct," and of all sexual conduct between unmarried persons.

Obviously, classroom disapproval of extramarital sexual activity is distinct from a criminal prohibition of deviate sexual conduct between persons of the same sex. Such a distinction, however, need not be considered an arbitrary and capricious attack on a class of "homosexuals" as Petitioners suggest. *See, e.g.*,Pet. Brief at 45 (describing section 21.06 as part of a history of "irrational anti-gay discrimination.").

Criminal prohibitions of or disincentives for nonmarital sexual relations are part of the scheme of laws supporting marriage. The constitutional significance of the distinction between marital sex and nonmarital sex was eloquently explained by Justice Harlan in his prophetic dissent in *Poe v. Ullman*, 367 U.S. 497, 522, 552-553 (1961). After explaining the critical importance of marriage and of marital privacy, he noted that even the family could be regulated in some respects, including regulation of some sexual behavior by laws forbidding adultery and incest, for example, but that to attempt to regulate marital sex would intrude upon the constitutionally protected realm of marital (family) privacy. That distinguished regulation of marital intimacy from regulation of nonmarital sexual behavior.

> "(T)he family * * * is not beyond regulation," Prince v. Commonwealth of Massachusetts, [321 U.S. 158, 166 (1944)], and *it would be an absurdity to suggest* either that offenses may not be committed in the bosom of the family or *that the home can be made a sanctuary for crime.* The right of privacy most manifestly is not an absolute. Thus, *I would not suggest that adultery, homosexuality,*

> *fornication and incest are immune from criminal enquiry, however privately practiced.* So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. [ ] 367 U.S. at 545-548 [] But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.
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> In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.
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> *Poe v. Ullman*, 367 U.S. 497, 522, 552-553 (1961).

In this assessment, Justice Harlan reflected a moral sense deeply rooted not only in the history of western civilization, but also deeply rooted in the history of this Nation. From the time of Thomas Jefferson, homosexual sodomy has been proscribed to protect marriage. A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital in The Papers of Thomas Jefferson, Vol. 2, 1777 to 18 June 1779, at 492, 493, 497 note † (Julian P. Boyd ed., Princeton Univ. Press 1950).

E. In failing to distinguish between married and unmarried couples, Petitioners would have this court require equal legal recognition of same-sex couples and married couples.

Petitioners argue that Section 21.06, and indeed all state prohibitions of sodomy, are products of invidious discrimination against gay and lesbian persons, intended solely to express "negative attitudes" toward such people. Pet. Brief at 39. Phrased in a positive light, Petitioners' argument suggests that a government must express the same approval for same-sex unions as it extends to opposite-sex unions. Thus, by extension of Petitioners' argument, any law precluding same-sex couples from marriage or other family relations is a product of that same individious discrimination.

Indeed, this is precisely what plaintiffs have argued in cases across the country seeking to invalidate the marriage laws of various states. As the plaintiffs in the Massachusetts marriage litigation argued, "If the concept of being gay or lesbian means anything, it includes those who wish to share their most intimate relationship with a partner of the same gender. Unlike rules preventing consanguineous or under-age marriages which operate evenly across the population and apply to everyone, rules preventing individuals from marrying others of the same sex operate systematically to exclude the class of gay men and lesbians." Brief of

Plaintiffs-Appellants, *Goodridge v. Dept. of Public Health*, at 61, No. SJC-08860 (Mass.). Similarly, the Plaintiffs challenging New Jersey's marriage law seek to have the law invalidated on equal protection grounds under the state constitution, arguing that the state unfairly discriminates against gay and lesbian persons by denying them the right to marry a person of the same sex. Complaint, *Lewis v. Harris* at para. 66-67, No. 15-03, Mercer Co. Super. Ct. (N.J.). Plaintiffs in Indiana have argued that same-sex "marriage" is required under the equal privileges guarantee of the Indiana Constitution. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 34, *Morrison v. Sadler*, Docket # 49D13-0211-PL-001946, Marion Super. Ct. (Ind.).

F. Numerous state and federal laws could be impacted by the Court's decision in this case, removing an important public policy debate from the political process

Every state in the United States legally recognizes the social contributions of marriage.[4] In recent years, 36 states have explicitly reaffirmed marriage as a male-female union, highlighting the legal distinction between same-sex and opposite-sex couples.[5] This action in turn relies in part on the

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[4] Even in those states in which the marriage statute does not explicitly declare marriage to be a male-female union, courts have uniformly interpreted the law in this manner. *See, e.g., Baker v. Nelson,* 191 N.W.2d 185, 185 (Minn. 1971); *Singer v. Hara,* 522 P.2d 1187, 1189 (Wash. Ct. App. 1974); *Baker v. State*, 744 A.2d 864, 869 (Vt. 1999).

[5] Ala. Code § 30-1-19 (2002); Alaska Const. art. I, § 25; Ariz. Rev. Stat. Ann. § 25-101 (West 2000); Ark. Code Ann. § 9-11-107 (2002); Ark. Code Ann. § 9-11-109 (2002); Ark. Code Ann. § 9-11-208 (2002); Cal. Fam. Code § 308.5 (West 2002); Colo. Rev. Stat. § 14-2-104 (2002); Del. Code Ann. tit. 13, § 101 (2001); Fla Stat. Ann. § 741.212 (West 2000); Ga. Code 19-3-3.1 (2002); Haw. Rev. Stat. § 572-3 (1999); Haw. Const. art. I, § 23; Idaho Code § 32-209 (2002); 750 Ill. Comp. Stat. Ann. § 5/212 (West 2000); Ind. Code § 31-11- 1-1 (2002); Ia. St. 595.2 (2002); Kan. Stat. Ann. § 23-101 (1999); Ky. Rev. Stat. Ann. §§

federal Defense of Marriage Act (DOMA) enacted overwhelmingly by Congress in 1996 and signed into law by President Clinton. Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997).

In addition, myriad laws from across the United States rest upon this definition of marriage. In the classroom, state and federal laws require that students be taught abstinence outside and fidelity within the male-female union of marriage.[6] State adoption laws recognize marriage as the basis for joint adoptions[7] and step-parent adoptions.[8] Tax laws are constructed to recognize the unity of the marital relationship, permitting joint filing by husband and wife.[9] A

402.040, 404.045 (Michie 2002); La. Civ. C. art. 89 (West 2000), amended by 1999 La. Act of July 2, 1999, No. 890 § 1; Me. Rev. Stat. Ann. tit. 19-A, § 701 (West 2002); Mich. Comp. Laws Ann. § 551.1 (West 2000); Mich. Comp. Laws Ann. § 551.271 (West 2000); Minn. Stat. Ann. § 517.01 (2002); Miss. Code Ann. § 93-1-1 (2002); Mo. Rev. Stat. § 451.022 (West 2002); Mont. Code Ann. § 40-1-401 (2002); Neb. Const. art. I, § 29; Nev. Question 2 (approved Nov. 5, 2002); N.C. Gen. Stat. § 51-1.2 (West 2000); N.D. Cent. Code § 14-03-01 (1960); 43 Okla. St. Ann. § 3.1 (West 2000); Pa. Consol. Stat.Ann. § 1704 (West 2000); S.C. Code Ann. § 20-1-15 (West 2000); S.D. Cod. Laws § 25-1-1 (2000); Tenn. Code Ann. § 36-3-113 (2002); Utah Code Ann. § 30-1-4 (2000); Va. Code § 20-45.2 (West 2000); Wash. Rev. Code Ann. § 26.04.020 (West 2000); W.Va. Code § 48-2-603 (2002).

[6] *See* 42 U.S.C. § 710 (2002) (providing grants to states for "abstinence education" including instruction in "the social, psychological and health gains to be realized by abstaining from sexual activity" and the normative role of abstinence outside of marriage and faithful monogamy within marriage.).

[7] *See* Ala. Stat. § 26-10A-5 (2002); Ariz. Rev. Stat. § 8-103 (2002); 13 Del. Code § 951 (2002); Fl. Stat. § 63.042 (2002); Ia. Stat. § 600.4 (2002); 750 Ill. Comp. Stat. § 50/2 (2002); Kan. Stat. § 59-2113 (2002); 18-A Maine Rev. Stat. § 9-301 (2002); Mt. Code Ann. 42-1-106 (2002); 10 Ok. Stat. §7503-1.1; Wis. Stat. § 48.82 (2002).

[8] *See* Ala. Stat. § 26-10A-27 (2002); Cal. Fam. Code App. § 227.10 (2002); Ga. St. § 19-8-3(c) (2002); ; Iowa. Code § 600.4 (2002); Mt. Code Ann. § 42-4-302 (2002); N.M. Stat. § 32A-5-32 (2002); N.C. Stat. § 48-4-101 (2002); Vt. Stat. Ann. tit. 15A, § 4-101 (2002).

[9] *See, e.g.*, 26 U.S.C. § 6013 (2002).

recent study conducted by the Office of Legislative Research in Connecticut identified 588 laws which distinguish on the basis of marriage or marital status. Susan Price-Livingston, *Connecticut Laws Involving Marital Status*, OLR Research Report #2001-R-0606 (Feb. 5, 2002) (Conn.). These results are comparable to less definitive research done in other states.

"The word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times." Defense of Marriage Act, Rep. 104-664, Comm. on Judiciary, 104th Cong., 2d Sess., July 9, 1996, at 10. Congress was wise enough to exercise its power under Article IV, Section I of the Constitution to repudiate an effort to force states to legalize same-sex marriage by distortion of the Full Faith and Credit Clause. Defense of Marriage Act, Pub. L. 104-199, September 21, 1996, 110 Stat 2419 (Sept. 21, 1996). This Court should repudiate the effort to force states to legalize same-sex marriage through a distortion of the Equal Protection and Due Process Clauses.

G. Deference to the Texas Legislature would preserve the important principle of federalism in family laws.

The regulation of domestic relations, including the definition and regulation of marriage, has long been considered to fall almost entirely to the states. "From the earliest days of the Republic until the recent past, family law has unquestionably belonged to the states." Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1821 (1995). The federal government has no constitutional authority to directly regulate marriage or divorce or other family relations and institutions. This Court has observed, not infrequently, that the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually

exclusive province of the states." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). Thus, the direct and indirect regulation and enforcement of family law is left primarily to state courts, and the governing rules are state, not federal, laws.

Federalism's deference to state regulation of family relations has a constitutional foundation. Substantively, the powers of the federal government are limited to those specifically enumerated in the Constitution, and since the power to regulate family relations is not so enumerated that power is deemed reserved to the States. *See* U.S. Constitution, Amendment X; Lynn D. Wardle, *Institutionalizing Marriage Reform Through Federalism* in Revitalizing the Institution of Marriage for the Twenty First Century (2002).

In the Federalist Papers, No. 10 James Madisons famously declared: "The federal Constitution forms a happy combination . . . ; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." The Federalist No. 45, at 83 (James Madison) (Clinton Rossiter ed., 1961). He again explained::

> The powers delegated by the proposed constitution to the federal government are few and defined. Those that remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State.

Id. at 292-93.

Hamilton suggested in Federalist No. 17 that the national government would be concerned with matters of "[c]ommerce, finance, negotiation, and war" while the States governments would have priority in regulation "[t]he administration of private justice between citizens of the same State, the supervision of agriculture and of other concerns of a similar nature," and "regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . ." Id. at 118-120. He also noted: "[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty." Id. at 290.

Since 1789 the broad, general authority of the states to regulate family relations, and the absence of virtually any authority of the federal government to directly regulate family relations has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law still remains, primarily a matter of state law.

In several notable recent decisions, this Court has applied the federalist principle to invalidate as unconstitutional laws enacted by Congress that went beyond the limited powers delegated to Congress. *See, e.g., United States v. Morrison*, 529 U.S. 598, 607, 615-16 (2000). Marriage has been a particular area of deference to state regulation. This Court has reiterated its declaration first made in 1878, that "[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878). While the exact contours of constitutional federalism are not clear, "[t]hroughout the debate on federalism, family law emerges as the one clear case in which federal involvement is inappropriate, an uncontested core rendered special precisely

because almost everything else has been nationalized and the limits on federal power elsewhere are so murky." Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297, 1297-98 (1998).

Behind these federalism practices are many strong and important policy values. Thus, federalism in family law is not a mere anachronism but is a doctrine based upon significant perceptions of the realities associated with the government of a large, heterogenous nation. These underlying policy values include pluralism, communitarianism, experimentation, and respect for state expertise and sovereignty. Federalism in family law preserves pluralism by guaranteeing at least fifty different zones for family policy development. By insisting that marriage be regulated a local (state) rather than national level, the vitality of small communities - who would be drowned out in policy debates at the national level but who may have some significant voice in state politics - is enhanced. Federalism in family law reflects the long-held belief that laws regulating families should reflect local values because those are such sensitive, delicate matters that any attempt to regulate them at the national level would guarantee neglecting the interests of minority communities. Charles Louis de Secondat (Baron de Montesquieu), The Spirit of the Laws, Book XIX, ch. 14, and at Book XIX, ch. 5 (T. Nugent trans., 1902). Federalism allows the states to experiment with different policies, rules and procedures in a way that functions as fifty separate laboratories. As Justice Brandeis wrote famously: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Federalism in family law entails respect for the expertise of state lawmakers, who have

been enacting and revising family laws since the time of the American colonies.

III. THE APPROPRIATE CONSTITUTIONAL RESPONSE TO THIS CASE IS FOR THIS COURT TO DEFER TO THE TEXAS LEGISLATURE.

A. Deferring to the Texas Legislature would not conflict with this Court's holding in Romer v. Evans

Petitioners argue that section 21.06 conflicts with this Court's holding in *Romer* v. *Evans*, 517 U.S. 620 (1996), because it is based solely upon "animus" toward homosexuals, rather than any legitimate state interest. This argument misunderstands the holding in *Romer*.

The Supreme Court's opinion in *Romer* was a very narrow one that applies only to laws, such as Colorado's Amendment 2, that prohibit *all* levels of government from protecting a *particular* class of citizens against *any* kind of discrimination. The constitutional flaw in Colorado's Amendment 2 was its extreme overbreadth, not the identity of the group it adversely affected. The majority in *Romer* applied the lowest standard of review -- the rational basis test -- and found that no legitimate purpose reasonably fit the infinitely broad sweep of the disability imposed by the Amendment. *Id.* at 635.

The law struck down in *Romer* was a constitutional amendment that prohibited all levels of state and local government from enacting any law or policy providing homosexuals any "protected status or claim of discrimination." *Id.* at 624. The extreme breadth of this provision made it possible to imagine instances in which Amendment 2 would bar policies designed to protect homosexuals from harms that everyone would acknowledge

to be wrongful. The opinion in *Romer* concluded that the "unprecedented" evil of Amendment 2 was that it identified persons by "a single trait" and then "denie[d] them protection across the board." *Romer*, 517 U.S. at 633. The Amendment imposed "a broad and undifferentiated disability on a single named group" by denying "specific protection" against "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631-632. Homosexuals were placed completely outside the protection of the law and could "obtain specific protection against discrimination only by enlisting the citizenry of Colorado." *Id.* at 631. As a result, a review of lower court decisions relying on *Romer* indicate that the impact of the opinion has been extremely narrow. *See* William C. Duncan, *The Legacy of* Romer v. Evans–*So Far* 10 WIDENER J. PUB. L. 161 (2001).

The Texas law under attack here is not a status-based law that fences out a particular group from protection against any and all discriminatory wrongs. [10] As the Court explicitly stated in *Romer*, ordinary laws will be "sustained" so long as they are "narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it serve[s]." Id. at 632-633.

Unlike Colorado Amendment 2, the Texas law focuses on a narrow and specific issue and does not impose an across-the-board disability on a particular named group. It does not target a class of persons defined by status and deny that class the opportunity to protect itself politically against a limitless number of discriminatory harms and exclusions.

[10] In addition to the factual defects noted in Section I, supra, there is no indication in the facts of this case that Petitioners would even identify themselves as homosexuals, undermining even their standing to claim that the law discriminates on the basis of their sexual orientation. Pet. Br. at 32, n.24.

The law does not forbid any individual or group from seeking political protection against any kind of public or private discrimination. Indeed, anyone who desire to engage in sodomy is free to use the political process to change the law that offends them.

If the object of this case were really to invalidate the Texas sodomy law an argument based on desuetude would seem more fitting than a constitutional argument. "Criminal prosecution for sodomy is rare." Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813, 813 (2001), and usually occurs when exceptional circumstances (such as flaunting behavior or solicitation in public places, commercial sex, threat to children, etc.) are present. "Sodomy laws are not generally enforced per se--few individuals are prosecuted specifically for acts of consensual sodomy."[11]

In *Maynard v. Hill*, 125 U.S. 190 (1888), this Court noted that, "Marriage, as creating the most important relation in life, as having more do to with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." *Id.* at 205. Whatever this Court does, it should recognize that promoting marriage is, as this Court has continuously recognized, a valid and important governmental interest. As such, State legislatures should be able to enact legislation, otherwise constitutional, that promotes this interest.

Like the law of all states, and reflecting the decisions of this Court, Texas law extends licensure and affirmative

[11] *Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982) . *See* Richard D. Mohr, Gays/Justice: A Study of Ethics, Society, and Law 51 (1988) ('[S]odomy laws are virtually never enforced.'); Richard A. Posner, Sex and Reason 4, 292 (1992) (noting that sodomy laws are 'dead letters'); Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. Rev. 737, 767 n. 142 (2000).

recognition of the sexual relationship within marriage. Tex. Fam. Code Ann. § 2.001(a) (West 2002). Ignoring the role of marriage, Petitioners have attempted to isolate section 21.06 from its place within the larger scheme of Texas statutes. *See, e.g.*, Pet. Brief at 36 ("[The state has] decided to single out same-sex couples for intrusive regulation and condemnation."). Viewed differently, however, section 21.06 may be viewed as part of an incremental system adopted by the Texas legislature to channel human sexuality into a stable and monogamous marital relationship. Even if the statutory scheme does not perfectly conform to that goal, it can be seen as a rational effort toward that legitimate end. The state need not negate every possible irrational explanation for the statute, but simply put forward a single interest to which the statute is rationally related. *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) ("Under rational basis scrutiny, the means need only be "rationally related" to a conceivable and legitimate state end. The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review." (internal citations omitted)). Moreover, as Justice Holmes noted, in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922): "If a thing has been has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

B. Deference to the Texas Legislature Recognizes the Importance of Open Public Debate in Democratic Society

As Petitioners note, many states have repealed their sodomy laws in recent years, either through legislative or judicial pronouncement. Such developments are testimony to the ongoing public debate which is currently underway in American states. This type of public debate over controversial social issues is a hallmark of American representative government. As Constitutional rights and

liberties are currently construed, individuals on all sides of the debate may participate in the legislative process and help to shape the understanding of morality and proper regulation of sexual activity.

The legislature is the proper arena in which to shape state public policy. Only in egregious cases should this Court step in to rewrite state laws. Judicial intervention in this case would remove this important policy issue from the democratic process, effectively terminating the public debate. As this Court held in *Romer*, a constitution should not be used to deprive a distinct group of people – even a minority – of their voice in the political process.

Neither does the fact that other states have repealed their sodomy laws create a constitutional mandate that Texas repeal section 21.06. Due Process and Equal Protection jurisprudence, unlike this Court's recent holding in Eighth Amendment jurisprudence, are not dependent upon popular approval, nor do they evolve at some intangible tipping point, requiring unanimity wherever there exists a majority. *Cf. Washington v. Glucksberg* 521 U.S. 702, 721 (1997) (rooting substantive due process analysis in the "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition." (citations omitted)); *Atkins v. Virginia*, 536 U.S. 304, 122 Sup.Ct. 2242, 2249 (2002) (holding that the change in sister state policy regarding execution of mentally retarded persons made such executions "unusual" and thus constitutionally repugnant).This Court should not spend its rare coin of public credibility in a quixotic gesture to speed up or circumvent the ongoing process of democracy. The needs of the national government and the business of the Court are not so lacking nor are the processes of reform in the States so frozen that this Court should assume the lead in the political process of establishing a national policy on sexual or marriage regulation.

CONCLUSION

For the reasons stated above, Petitioners' writ of certiorari should be dismissed as improvidently granted. In the alternative, this Court should affirm section 21.06 in deference to the Texas Legislature's rightful jurisdiction to regulate marriage and familial relations.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

vs.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas, Fourteenth District

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether this Court should dismiss the writ of certiorari as improvidently granted in light of the extreme paucity of the record?

2. Whether the Due Process Clause of the Fourteenth Amendment renders facially unconstitutional a state law prohibiting extramarital sexual activity, specifically same-sex sodomy?

3. Whether the Equal Protection Clause of the Fourteenth Amendment renders facially unconstitutional a state statute prohibiting same-sex sodomy?

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is a nonprofit public interest law firm and education organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have briefed and argued, or presented the views of amici curiae, in numerous cases before this Court on these issues.

The ACLJ is committed to the defense of marriage and the traditional family. This case poses a threat to both. First, none of the petitioners' arguments challenging the distinction in legal treatment of extramarital heterosexual acts and homosexual acts would not also be an argument against the distinction in legal treatment of marital heterosexual unions and homosexual unions. Thus, petitioners strike at the institution of marriage itself. Second, petitioners argue for substantive due process protection of extramarital sexual acts. To recognize extramarital sex acts as "fundamental rights" would jeopardize the wide array of state laws governing even consensual, adult sexual activity, further pushing this nation toward sexual libertinism. The Constitution, however, neither does nor ought to enshrine the Sexual Revolution.

The ACLJ is also committed to the rule of law and judicial restraint. In this case petitioners, in what may well be a contrived test case, request a sweeping, novel constitutional decision based upon the most sparse record conceivable. This Court, however, is not a forum for abstract debates on constitutional questions. The ACLJ urges this Court to dismiss the writ as improvidently granted and to decline to let itself be

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[1]No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

used, in this possibly artificial test case, for political purposes.

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. This Court should dismiss the writ as improvidently granted. The minuscule record in this case establishes virtually nothing beyond the fact that petitioners committed anal same-sex sodomy. For all the record reflects, the sodomy could have been nonconsensual, or public, or paid for, or incestuous, or part of an anonymous "one-night stand" arranged through an online chat room. The record does not even indicate whether either participant could fairly be described as homosexual in orientation. This case is therefore unsuitable for the landmark adjudication petitioners seek. All that is properly before the Court is a purely facial challenge to the classification, and prohibition, of certain extramarital deviant sexual acts. There is not even a record upon which to make either an informed judgment about such acts (for due process purposes) or an informed comparison between the acts within and without the scope of the challenged Texas statute (for equal protection purposes).

2. This Court should affirm the judgment rejecting petitioners' claim of a fundamental right to engage in same-sex sodomy. This Court has never recognized a fundamental right to engage in extramarital acts of sexual gratification, much less a right to sexual gratification unconnected to marriage or procreation. To reach such a result in this case would require not only the overruling of Bowers v. Hardwick, 478 U.S. 186 (1986), but also the invalidation of fornication laws (as petitioners admit) and a host of other laws defining sex offenses. This Court has repeatedly cautioned against the expansion of substantive due process, and no such expansion is warranted here. This case presents only a facial challenge, and the Texas sodomy statute clearly may be constitutionally applied in a broad range of circumstances, e.g., to coercive acts, to prostitution, to

public acts of sodomy, etc. (For all the record shows, such circumstances may well have applied here.) Hence, petitioners' facial challenge must fail.

3. This Court should affirm the judgment rejecting petitioners' equal protection claim. This case has been litigated under the rational basis standard; hence, as this Court explained in Heller v. Doe, 509 U.S. 312, 319 (1993), it would be wholly improper and unfair to inject a new standard here. Moreover, because there is no fundamental right at issue and because the record does not even identify what supposed suspect or quasi-suspect class petitioners belong to, heightened scrutiny is in any event unjustified. Under rational scrutiny, the ban on same-sex sodomy clearly passes constitutional muster. There are at least three, independently adequate, rational bases for the statute. First, a ban on same-sex sodomy permissibly furthers public morality. Second, the extensively documented health risks of same-sex sodomy supply a strong public health rationale for the statute. Third, based upon the view of all nine Justices in Bowers, as well as this Court's other "privacy" decisions, a state could reasonably conclude that, to minimize the likelihood of constitutional attack and invalidity, a ban on sodomy needed to exclude heterosexual acts. Importantly, the distinction between heterosexual and homosexual unions is the hallmark of marriage law. To invalidate that distinction here would be tantamount to holding marriage unconstitutional.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED.

There is virtually no record in this case.

All the probable arrest affidavits show is that two adult males – a 55-year-old white male (John Lawrence) and a 31-year-old black male (Tyron Garner) were found by police officers in the act of anal sodomy inside the apartment where the

former resides. Pet. App. 129a, 141a. The record does not reflect whether the sodomy was coerced or consensual,[2] performed for pay or not,[3] displayed to members of the public (e.g., done in full view of others in the room or in front of an unobstructed picture window) or not,[4] incestuous or not,[5] part of a long-standing practice or simply a one-time anonymous tryst in response to an internet solicitation.[6] The record likewise gives no indication whether either petitioner could fairly be described as homosexual, bisexual, or heterosexual (or some other category) in orientation (assuming, for present purposes, that such categories have coherence and constitutional relevance).

Petitioners did allege, in their motion to quash, that the criminal charges here "rest[ed] solely on consensual, adult, private sexual relations," Pet. App. 118a, 131a, and that petitioners are "gay Texans," id. at 121a, 133a. But allegations

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[2]There is no indication whether the petitioners, or either of them, were even capable of consenting (as opposed to being intoxicated, mentally ill, or mentally disabled, for example). Petitioners concede that "consent is a critically important dividing line," Pet. Br. at 13. Yet there is no evidence of consent in the present record.

[3]The probable cause affidavits list no occupation for Lawrence and list "unemployed" for Garner. Pet. App. 129a, 141a.

[4]The police were responding to a reported weapons offense. Id. The person who made the (false) report thereby purported to know, in some detail, what was going on in the apartment.

[5]The record gives no information about the blood or legal relationship, if any, between the petitioners. Cf. Tex. Penal Code Ann. § 25.02 (prohibiting incest, including "deviate sexual intercourse," and covering inter alia half-siblings and half- or whole-blood uncles and nephews).

[6]The record gives no information about the relationship, if any, between petitioners.

are not evidence. Moreover, under Texas law, unsupported allegations in a motion to quash are inadequate. "The proponent of a motion to quash the indictment has the burden of proof and may offer proof of the allegations in the motion to quash." State v. Perez, 948 S.W.2d 362, 364 (Tex. Crim. App. 1997) (citing, inter alia, Wheat v. State, 537 S.W.2d 20 (Tex. Crim. App. 1976), and Worton v. State, 492 S.W.2d 519 (Tex. Crim. App. 1973)). Accord Wheat, 537 S.W.2d at 520 ("The defendant has the burden of proof on a motion to quash an indictment or complaint"). Here, as in Worton, "the motion to quash was not self-proving and the [defendant] offered no proof in support of his allegation." 492 S.W.2d at 520.

In short, the record is essentially devoid of any meaningful fact beyond the mere existence of a violation of the challenged statute. Yet from this tiny fulcrum, petitioners would leverage a landmark constitutional decision.

The writ should be dismissed as improvidently granted.[7]

First, the paucity of the record precludes all but a facial challenge to the statute under the Due Process Clause. Lawrence v. Texas, 41 S.W.2d 349, 350 (Tex. Ct. App. 2001) ("[T]he facts and circumstances of the offense are not in the record. . . . Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional"). There can be no "as applied" review where the Court simply cannot tell how the statute was applied.

Second, the virtually complete absence of record information about the petitioners and their circumstances precludes any class-based challenge under the Equal Protection

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[7]This Court has dismissed writs even when four Justices continue to believe the case should be heard on the merits. E.g., New York v. Uplinger, 467 U.S. 246 (1984) (dismissing writ over dissent of Chief Justice Burger and Justices White, Rehnquist, and O'Connor); NAACP v. Overstreet, 384 U.S. 118 (1966) (dismissing writ over dissent of Chief Justice Warren and Justices Douglas, Brennan, and Fortas).

Clause, as, it is impossible to know in what class to situate the petitioners (other than the class of males over the age of eighteen). All that the record would permit would be a facial challenge to the classification of acts, not persons, affected by the statute.

Third, even aside from the sharp limitations an impoverished record imposes on the issues presented, a sparse record provides an exceedingly poor vehicle for "landmark" constitutional litigation. This Court is not empowered to issue advisory opinions about hypothetical scenarios. Preiser v. Newkirk, 422 U.S. 395, 401 (1975). And a full record can be a necessary predicate to informed, reasoned adjudication of important constitutional issues. E.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).[8] Thus, while the record in this case suffices for affirmance or summary disposition upholding the judgment below, it does not at all lend itself to legal pathbreaking or to the announcement of new constitutional doctrines.

This Court should dismiss this writ as improvidently granted.

II. PETITIONERS' SUBSTANTIVE DUE PROCESS CHALLENGE FAILS.

This Court has never recognized a federal constitutional right to engage in extramarital sexual acts -- even the consensual, nonmercenary, private acts of adults, much less sexual acts that deviate from the normal sexual union of a man and a woman. Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5 (1977) ("the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state

[8]Petitioners' repeated forays into material outside the record, e.g., Pet. Br. at 16-18 & nn.10-12, 33 & n.25, 42-48 & nn.30-32, 34-36, bypasses the crucible of trial litigation so essential to sorting the wheat from the chaff.

statutes regulating private consensual behavior among adults . . . and we do not purport to answer that question now") (citations, editing marks, and internal quotation marks omitted). Creation of such a novel right would require precisely the sort of ahistorical, atextual, freewheeling substantive due process adjudication which this Court has renounced for the past thirty years. See, e.g., Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997); Reno v. Flores, 507 U.S. 292, 302-03 (1993); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); Michael H. v. Gerald D., 491 U.S. 110, 121-23 (1989) (plurality); Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). As Justice Stevens wrote for a unanimous Court,

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins, 503 U.S. at 125 (citation omitted).

Petitioners rely heavily upon this Court's abortion and birth control jurisprudence. E.g., Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Casey, however, relied heavily upon stare decisis in declining to overrule in toto the line of cases beginning with Roe v. Wade, 410 U.S. 113 (1973). See Casey, 505 U.S. at 854-69. In the present case, existing precedent -- Bowers -- weighs against recognition of the proposed right; hence the stare decisis rationale of Casey, regardless of its merits,[9] gives no support to petitioners.

[9]Some scholars have questioned the legitimacy of relying upon stare decisis in the context of constitutional interpretation. See generally Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the

(continued...)

Moreover, the Roe/Carey/Casey line of cases focuses on "the decision whether or not to bear or beget a child," Carey, 431 U.S. at 685, not the selection of or indulgence in the sexual gratification of one's choice. Accord Casey, 505 U.S. at 852-53 (abortion and birth control precedents concern "the meaning of procreation" and "human responsibility and respect for it"). Compare Pet. Br. at 40 (conceding that "'deviate sexual intercourse' is unrelated to any interest in reproduction, for oral and anal sex are obviously not methods of reproduction for any couple").[10] As this Court emphasized in Carey, "we do not hold that [strict scrutiny applies to a state law] whenever it implicates sexual freedom, . . . or affects adult sexual relations," 431 U.S. at 688 n.5 (internal quotation marks and citations omitted).

This Court's case law, therefore, provides no warrant for enshrining the potentially boundless variety of forms of sexual gratification in the Due Process Clause of the Fourteenth Amendment. Compare Pet. Br. at 13 (urging declaration of constitutional right "whether and how to connect sexually").[11] To do so would be to intrude in a fractious, polarizing way in the

[9](...continued)
Precedential Effect of Roe and Casey? 109 Yale L.J. 1535, 1548 n.38 (2000) (sketching argument and collecting authorities); Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 27-28 (1994).

[10]A crucial unspoken premise of petitioners' argument is that the election of anal sodomy, as opposed to vaginal intercourse, is merely a matter of "preference," like selecting what wine to have with dinner (or perhaps, in a less trivial example, choosing whom to vote for in an election). This completely ignores human anatomy and biology. See Amicus Brief of Texas Physicians Resource Council.

[11]Petitioners concede that their due process argument would at a minimum require recognition of a fundamental constitutional right to fornication. Pet. Br. at 22 n.16.

ongoing political and social tug of war over competing worldviews regarding sexual norms. That is not the role of this Court.

The Court's prior ventures into constitutional policymaking have damaged the institutional integrity of this Court. The "painful[] . . . face-off," Bowers, 478 U.S. at 194, over Lochner v. New York, 198 U.S. 45 (1905), and its progeny, the raw national division over Roe v. Wade and its progeny, and the current degeneration of the judicial confirmation process into the politics of character assassination and ideological accusation, are three prominent consequences of this Court making itself a font, rather than an interpreter, of constitutional rights. Such institutionally deleterious consequences counsel strongly against setting in constitutional concrete, by judicial fiat, the latest proposed constitutional right, a right supposedly hidden for more than a century in the shadows of the Constitution.

Even if this Court were inclined to add noncommercial, consensual, private, adult, same-sex sodomy to the list of unenumerated fundamental constitutional rights, this case would not be the proper vehicle for such a declaration. The case at bar presents only a facial challenge to the Texas statute. Supra § I. Hence, this Court will sustain the law unless it would be unconstitutional in all of its applications. United States v. Salerno, 481 U.S. 739, 745 (1987);[12] Reno v. Flores, 507 U.S. at

[12]This case does not involve the First Amendment. Hence, the overbreadth exception to Salerno does not apply. Id. at 745. Even if the overbreadth doctrine were theoretically applicable, there is simply no record in this case by which to hazard a guess about the relative scope of various permissible and impermissible applications of the statute. Hence, there is no basis for a finding of substantial overbreadth. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate
(continued...)

301 ("To prevail in such a facial challenge, [petitioners] must establish that no set of circumstances exists under which the [statute] would be valid") (emphasis added; internal quotation marks and citation omitted). The statute at issue here undisputedly has many constitutional applications -- e.g., to coercive sodomy, to sodomy prostitution, to sodomy of minors and others legally incapable of consenting, to public sodomy, etc. See Pet. Br. at 6, 22 n.16, 39-40 (conceding validity of prohibiting such conduct). Hence, petitioners' substantive due process claim must fail.

III. PETITIONERS' EQUAL PROTECTION CHALLENGE FAILS.

Petitioners' equal protection challenge to the Texas sodomy statute is tantamount to a challenge to the constitutionality of limiting marriage to a heterosexual couple. For the reasons set forth below, this challenge must fail.

A. There is No Fundamental Right at Issue.

There is no fundamental constitutional right to sodomy, much less same-sex sodomy. Supra § II. Hence, the classification at issue impinges upon no fundamental right that would warrant heightened scrutiny.

B. There is No Suspect Class at Issue.

Nor does any concern for "suspect classes" warrant heightened scrutiny here.

---

[12](...continued)
sweep") (emphasis added).

1. The question is not properly presented.

Petitioners have not properly presented any claim to suspect class status:

> Even if [petitioners] were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which . . . does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required . . . to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.

Heller v. Doe, 509 U.S. 312, 319 (1993). Hence, in the present case, as in Heller, the rational basis standard must govern.

2. The record does not support a challenge based on class status.

The extremely sparse record in this case, as noted earlier, supra § I, provides almost no information about petitioners or their relationship to each other. It is therefore impossible to situate petitioners in any supposed class -- e.g., homosexual persons, homosexuals involved in a long-term, committed relationship, etc. -- for purposes of standing to raise a challenge under the Equal Protection Clause. A fortiori, this Court cannot conduct any comparison of classes for purposes of equal protection analysis on the merits. Petitioners, for example, cannot claim discrimination against the class of those with a homosexual orientation, as the record does not indicate whether petitioners fall into that class.[13]

---

[13]It does not logically follow from the mere commission of an act of same-sex anal sodomy that petitioners are homosexual in orientation, any more
(continued...)

C. The Only Classification at Issue is the Classification of the Conduct, Not the Persons Involved.

In light of the foregoing, the only classification at issue, for equal protection purposes, is the classification of the act of same-sex sodomy (i.e., sodomy between people of the same sex, not necessarily sodomy between homosexuals). As noted above, no classification of individual persons is involved. Compare Romer v. Evans, 517 U.S. 620, 633 (1996) (challenged law "identifies persons by a single trait") (emphasis added).

Petitioners repeatedly blur the distinction between "act" and "actor." It is vital to recall, therefore, that the challenged Texas statute bars all persons, regardless of sexual orientation or preference, from engaging in same-sex sodomy. See Vacco v. Quill, 521 U.S. 793, 800 (1997) (noting that challenged statute permits no one to engage in the forbidden act, but state allows everyone to engage in an arguably comparable act; thus, statute does not "treat anyone differently from anyone else or draw any distinctions between persons"). To imply, as petitioners do, that only homosexual persons are affected, is misleading and inaccurate. While it may be true that those who particularly desire to engage in the prohibited acts are more likely to regard the law as an obstacle (though the record does not speak to this), the same holds true for countless laws restricting human behavior. Id. ("Many laws affect certain groups unevenly, even though the law itself treats them no differently . . .") (editing marks and citation omitted; emphasis added). Motorcycle aficionados are presumably more likely affected by helmet laws than those who never or only occasionally ride a motorcycle.

[13](...continued)
than it would follow from another person's act of heterosexual intercourse -- or even entry into marriage -- that the person is necessarily heterosexual. Petitioners concede as much. Pet. Br. at 33 & n.25.

Drinkers are presumably more likely affected by liquor laws than teetotalers. Night owls are presumably more likely affected by curfew laws than early birds. But if the mere fact that some people have a greater or more regular desire to engage in the prohibited act than others were sufficient to raise an equal protection issue, then virtually every law would be subject to such a challenge.

Petitioners try to extract from the statute's treatment of couples -- i.e., the participants in the act viewed as an ensemble -- a sex-based classification. But the differential treatment of same-sex and different-sex couples is the hallmark of marriage, and thus no more entails an invidious sex-based class here than do marriage laws nationwide. Petitioners surely disagree with the proposition that limiting marriage to one man and one woman is constitutional -- to concede otherwise is to concede the validity of the very distinction they challenge. But this simply highlights the radical nature of petitioners' novel constitutional theory. Unless this Court is prepared to announce the unconstitutionality of marriage, petitioners' sex-based discrimination argument must fail.[14]

[14]Petitioners' argument would also call into question laws that restrict only heterosexual acts, such as California's incest statute prohibiting unions of uncle and niece, or of aunt and nephew, but not of uncle and nephew, or of aunt and niece. See Cal. Penal Code § 285 (West 1999) (tying incest prohibition to relationships too close to marry); Cal. Family Code § 2200 (West 1994) (incestuous bond would include uncle and niece or aunt and nephew). See also Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (rejecting Equal Protection Clause challenge to statutory rape law limited to male perpetrators).

D. The Texas Sodomy Statute Easily Passes Rational Basis Scrutiny.

1. The standard

"If a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect class, we will uphold it so long as it bears a rational relation to some legitimate end.'" Vacco v. Quill, 521 U.S. at 799 (quoting Romer v. Evans, 517 U.S. at 631) (brackets omitted). Such "rational-basis review" recognizes that there is no '"license for courts to judge the wisdom, fairness, or logic of legislative choices.'" Heller, 509 U.S. at 319 (quoting FCC v. Beach Communications, 508 U.S. 307, 313 (1993)). Accord City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("When social . . . legislation is at issue, the Equal Protection Clause allows states wide latitude"). Thus,

> a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. . . . Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. . . . Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. . . . Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . .
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. . . .

> A statute is presumed constitutional, . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, . . . whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.

Heller, 509 U.S. at 319-21 (editing marks and citations omitted). "This standard of review is a paradigm of judicial restraint." FCC v. Beach Communications, 508 U.S. at 314.

2. Disposing of petitioners' flawed arguments

The Texas sodomy statute easily satisfies this deferential standard of review. In reaching this conclusion, several key points must be born in mind.

First, the heart of petitioners' equal protection argument is the decision of Texas to ban acts of same-sex sodomy but not acts of male/female sodomy.[15] As noted above, this is precisely the distinction between (lawful) heterosexual marriage and (unlawful) homosexual union. To embrace petitioners' argument is therefore to overthrow the legal institution of marriage as exclusively a union between one man and one woman. This implication alone illustrates the unprecedented, revolutionary, and deeply flawed nature of petitioners' argument.

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[15] Of course, the decriminalization of male/female sodomy, like the decriminalization of suicide, is not at all the same as affirmative approval or encouragement.

Second, state legislation in matters sexual draws distinctions all the time between "the same act" in only slightly different contexts. Heterosexual intercourse, conducted in an otherwise indistinguishable manner between the same persons, will (depending on state law) be lawful or unlawful depending on, for example: whether it is done the day before or the day after the birthday of one of the participants (age of consent laws);[16] the age difference between the participants (statutory rape laws);[17] the exchange of payment (prostitution laws);[18] the marital status of the participants (fornication and adultery laws);[19] the blood or legal relationship between the participants (incest laws);[20] the

[16]E.g., Cal. Penal Code § 261.5 (West Supp. 2003) (unlawful intercourse with minor under 18); Fla. Sta. Ann. § 800.04(5) (West Supp. 2003) (lewd or lascivious molestation of minor under 16); 720 Ill. Com. Stat. Ann. 5/12-14.1, 5/12-14(b), 5/12-15(b), (c), 5/12-16(c), (d) (West 2002) (tying offense level to age of victim).

[17]E.g., Cal. Penal Code § 261.5 (West Supp. 2003); Fla. Stat. Ann. § 794.05 (West 2000); id. § 800.04(5) (West Supp. 2003); 720 Ill. Comp. Stat. Ann. 5/12-14.1, 5/12-14(b), 5/12-15(b), (c), 5/12-16(c), (d) (West 2002).

[18]E.g., Fla. Stat. Ann § 796.07(e), (i) (West 2000); 720 Ill. Comp. Stat. Ann. 5/11-14, 5/11-18 (West 2002); N.Y. Penal Law §§ 230.00, 230.02 (McKinney 2000).

[19]E.g., Fla. Stat. Ann. §§ 798.01 (adultery), 798.02 (fornication) (West 2000); 720 Ill. Comp. Stat. Ann 5/11-7 (adultery), 5/11-8 (fornication) (West 2002); N.Y. Penal Law § 255.17 (McKinney 2000) (adultery).

[20]E.g., Cal. Penal Code § 285 (West 1999); Fla. Stat. Ann. § 826.04 (West 2000); 720 Ill. Comp. Stat. Ann. 5/11-11 (West 2002); N.Y. Penal Law § 255.25 (McKinney 2000).

presence of onlookers (public indecency laws);[21] and, the presence of media (obscenity laws).[22] This is true, moreover, not just for the consummation of normal heterosexual intercourse but also for a range of other sexual acts, such as the exposure of one's private parts and a host of deviant practices.[23] Thus, petitioners' protestation that same-sex sodomy and opposite-sex sodomy are "the same act," even if accepted for purposes of argument,[24] does not distinguish a host of other laws governing sexual acts. In short, laws governing sexual acts commonly draw debatable and arbitrary lines in many ways, lines that vary from state to state and even from year to year within a state (as statutes are amended).

Third, petitioners' invocation of various collateral consequences of the challenged prohibition is an inappropriate diversionary tactic. Petitioners have raised no claim under the

[21]E.g., Cal. Penal Code § 311.6 (West 1999) ("obscene live conduct" before audience); Fla. Stat. Ann. § 847.011(4) (West 2000) (obscene show or performance); 720 Ill. Comp. Stat. Ann. 5/11-20 (West 2002) (participation in obscene performance); N.Y. Penal Law § 235.05 (McKinney 2000) (same).

[22]E.g., Fla. Stat. Ann. § 847.011(1)(a) (West 2000) (posing for obscene literature).

[23]E.g., Cal. Penal Code § 314 (West 1999) (indecent exposure); Fla. Stat. Ann. §§ 800.03 (same), 872.06 (necrophilia) (West 2000); 720 Ill. Comp. Stat. Ann. 5/11-9 (West 2002) (public indecency); N.Y. Penal Law §§ 245 (public lewdness), 245.01 (indecent exposure) (McKinney 2000). Cf. 720 Ill. Comp. Stat. Ann. 5/12-16.2 (West 2002) (crime of "intimate contact," by person infected with HIV, absent informed consent of partner).

[24]It is far from obvious, however, that same-sex sexual acts are "the same" as opposite-sex acts, except in the most reductionist manner. Indeed, this contention seems of a piece with the claim that same-sex "marriage" is the same as heterosexual marriage.

Fourth or Eighth Amendments. Hence, the present challenge must be evaluated on the assumption that the enforcement measures taken, and the punishment meted out, are constitutionally unobjectionable. Those persons, if any, who find themselves disabled by the treatment of sodomy as a crime, or as a crime of moral turpitude, are free to challenge such disabilities directly. But the constitutionality of a prohibition cannot ebb and flow with the independent existence of separate laws imposing derivative consequences, any more than a state could render unconstitutional its laws against race discrimination by attaching a punishment of drawing and quartering the offender. Whether the sentence or other secondary consequences of an offense are themselves constitutional is a separate issue not presented here.

3. Rational basis for the distinction

"[W]e never require a legislature to articulate its reasons for enacting a statute[; hence,] it is entirely irrelevant whether the conceived reasons for the challenged distinction actually motivated the legislature." FCC v. Beach Communications, 508 U.S. at 315. Here, there are at least three conceivable rational bases for the prohibition on same-sex sodomy. Each is independently sufficient to sustain the challenged statute.

a. Furthering morality

Respondent urges, and the court below accepted, the proposition that a concern for morality suffices to support the distinction between forbidding acts of same-sex sodomy and not forbidding acts of opposite-sex sodomy. Ample support exists for this rationale,[25] not just in Bowers, but in the plethora of

[25]This is not to concede that deviant heterosexual sex acts are somehow (continued...)

morally based laws found in this country (e.g., bans on race discrimination, obscenity, corruption of minors, fraud, ethical breaches in the legal profession, and so forth). Petitioners' equation of morality with mere "dislike" would casually abandon the whole notion of right and wrong, thus undercutting the very premises of petitioners' own claim to fairness.[26] Moreover, opposition to an act is not the same as opposition to the actor. Bray v. Alexandria Women's Health Center, 506 U.S. 263, 270 (1993). Were the contrary true, a law like the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 249, would be unconstitutional on grounds of animus toward pro-life persons.

b. Protecting public health

Anal sodomy is an abusive act, i.e., a misuse of the organs involved.[27] Not surprisingly, therefore, sodomy has adverse

[25](...continued)
moral simply because they are heterosexual. A state is not required, however, to be comprehensive in its response to a problem. "The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (quoted with approval in FCC v Beach Communications, 508 U.S. at 316).

[26]Under petitioners' rationale, hate crimes laws would be unconstitutional because they distinguish the same act based on "negative attitudes toward a group," Pet. Br. at 37, namely, the group of those harboring certain disfavored prejudices.

[27]See supra note 10. Abuse is no less abuse when the participants consent, as in autoerotic asphyxia, sadism and masochism, and various sexual bondage practices. Furthermore, consent to abuse is no protection against physical harm. For example, the bruises of a woman who agrees, for money, to be battered in a pornographic film, are no less real than the bruises of (continued...)

health consequences. See Amicus Brief of Texas Physicians Resource Council (documenting adverse health risks associated with practice of same-sex sexual acts). These consequences -- notably HIV/AIDS, but also a host of other diseases -- appear most heavily associated with same-sex sodomy. Id.[28] Therefore, it is certainly rational for a legislature to target the acts that give rise to the worst of the problem. Williamson v. Lee Optical, 348 U.S. at 489 (legislature may limit its response to "the phase of the problem which seems most acute") (quoted approvingly in FCC v. Beach Communications, 508 U.S. at 316).

c. Avoiding constitutional doubts

A state also has an obviously legitimate interest in tailoring its legislation to minimize the prospects of a successful constitutional attack. Texas had ample reason to believe that a same-sex sodomy ban was less vulnerable constitutionally than a blanket sodomy ban.

The Bowers Court was, of course, sharply divided on the merits of a ban on homosexual sodomy. But, a lopsided majority of the Court declined to give any assurance that a ban on heterosexual sodomy would pass constitutional muster. The majority expressly reserved the issue, 478 U.S. at 188 n.2 ("We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy"), and the dissenters expressly

[27](...continued)
anyone else.

[28]Whether this association results from a necessarily greater frequency of the act relative to normal intercourse when the participants are anatomically incapable of normal intercourse, or because the act is for biological reasons inherently more harmful when engaged in by members of the same sex, or for some other reason, is irrelevant. The rational basis for the statute rests upon targeting the consequence of the act by targeting the subset of acts most closely associated with the harm.

impugned the constitutionality of a ban on heterosexual sodomy, id. at 218-19 & n.10 (Stevens, J., joined by Brennan & Marshall, JJ.);[29] see also id. at 200-01 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.). A state could rationally conclude from the views of both majority and dissent in Bowers that the constitutionally safer course would be to ban only same-sex sodomy.[30] This prudential assessment, while not adequate to pass heightened scrutiny, does suffice as a rational basis for the distinction.

CONCLUSION

This Court should dismiss the writ as improvidently granted. In the alternative, this Court should affirm the judgment of the Court of Appeals of Texas.

[29]The quoted portion of the dissent by Justice Stevens mentions married couples; however, this Court's decision in Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972), makes clear that the Bowers dissenters would not so limit the scope of a constitutional right to sodomy.

[30]To the extent that cases like Eisenstadt and Carey hint at, without actually holding, the existence of a broad constitutional right of sexual liberty, a state would have that much more of an incentive to avoid testing the constitutional line for private, consensual, heterosexual acts -- the presumed heartland of any such liberty.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS
Respondent,

On Writ of Certiorari
To the Court of Appeals of Texas
Fourteenth District

BRIEF IN SUPPORT OF RESPONDENT ON BEHALF OF *AMICI CURIAE* TEXAS PHYSICIANS RESOURCE COUNCIL, CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS AND CATHOLIC MEDICAL ASSOCIATION

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INTEREST OF *AMICI CURIAE*

Amici are medical organizations that believe public health policy should be based upon scientific evidence rather than political expediency. They believe that the medical research clearly demonstrates the harmful nature of same-sex sodomy, and that compassionate, caring physicians should discourage such harmful behavior. *Amici* submit this brief to inform the Court of the public health concerns associated with same-sex sodomy.[1]

The Texas Physicians Resource Council is a statewide network of Christian physicians and dentists made up of approximately 500 members. Its purpose is to address medically related ethical issues that affect Texas families, including issues relating to homosexuality.

The Christian Medical and Dental Associations ("CMDA") are national organizations made up of the Christian Medical Association and the Christian Dental Association, with over 17,000 members. CMDA promotes evidence-based medicine and addresses policies on healthcare issues. Many CMDA members are involved in treating sexually transmitted diseases worldwide through medical missions to third world countries.

The Catholic Medical Association upholds principles of the Catholic faith and morality as related to the science and practice of medicine, and applies principles of faith and morality to modern medical science and practice.

SUMMARY OF ARGUMENT

Because Petitioners are not members of a suspect or quasi-suspect class, the standard of review for their equal protection challenge to the Texas same-sex sodomy law is rational basis. Under rational-basis review, the Texas legislature's motivation for enacting the same-sex sodomy law is irrelevant. Petitioners have the burden of negating every reasonably conceivable basis

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[1]All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

for treating same-sex sodomy different from opposite-sex sodomy. They have not done so. In fact, they have not even created a record from which this Court could conclude that the Texas same-sex sodomy law is without a rational basis. In order for the Court to reject the rational bases proffered by Respondent and the various *amici curiae*, it would have to weigh *de novo* complex, apparently contradictory evidence, without the benefit of expert testimony or cross examination. That is not an appellate function.

Texas has a legitimate interest in regulating public health, and the CDC has identified sexually transmitted diseases ("STDs") as a public health problem. Sodomy is an efficient method of transmitting STDs. And regardless of the reason, same-sex sodomy is far more effective in spreading STDs than opposite-sex sodomy. Multiple studies have estimated that 40 percent or more of men who practice anal sex acquire STDs. In fact, same-sex sodomy has resulted in the transformation of diseases previously transmitted only through fecally contaminated food and water into sexually caused diseases–primarily among those who practice same-sex sodomy.

The issue under rational-basis review is not whether Texas should be concerned about opposite-sex sodomy, but whether it is reasonable to believe that same-sex sodomy is a distinct public health problem. It clearly is.

ARGUMENT

I. THE LACK OF A RECORD WOULD REQUIRE THIS COURT TO ENGAGE IN *DE NOVO* FACT-FINDING IN ORDER TO ACCEPT PETITIONERS' EQUAL PROTECTION CLAIM

A. Petitioners Must Negate Any Reasonably Conceivable Basis for the Same-sex Sodomy Law

As explained in detail in the brief for *amicus curiae* American Center for Law and Justice, Petitioners are not members of

a suspect class.[2] Absent membership in a suspect class, the Petitioners' equal-protection challenge to the Texas sodomy statute is subject to rational-basis review. Under rational-basis review, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Board of Trustees of the University of Alabama v. Garret*, 531 U.S. 356, 367 (2001) (citations and internal quotation marks omitted).

Amici American Public Health Association ("APHA"), et al. ("Public Health *Amici*"), misconstrue the burden of proof in an equal protection challenge under rational basis review.[3] They contend that a public health interest[4] cannot justify the Texas sodomy law because the State has not defended on that ground, and there is no proof that the legislature relied upon that ground in enacting the statute. APHA *Amicus* Brief at 5-7. However, because this Court "never require[s] a legislature to articulate its reasons for enacting a statute, *it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.*" *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added). Thus, for purposes of rational basis review, it makes no difference whether the State has ever relied upon a conceivable basis

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[2]Indeed, the record is silent as to whether Petitioners consider themselves homosexuals. Even if they are homosexual, the *amicus curiae* brief of Concerned Women for America explains that homosexuals are neither politically powerless nor identifiable by an immutable characteristic.

[3]Public Health *Amici* overstate the case when they claim that "Texas has consistently maintained that the sole 'legitimate state interest' furthered by the Homosexual Conduct Law is 'preserving public morals.'" APHA *Amicus* Brief at 5. The sources cited support the statement that public morals is all the State has argued, but not that it disclaimed other interests.

[4]HIV/AIDS is the only disease that the Public Health *Amici* address in any detail. The public health interest identified in this brief is far broader in scope.

for a public interest; the only issue is whether the challengers have negated every conceivable basis. They have not.[5]

B. Petitioners Have Failed to Create a Record to Challenge Reasonably Conceivable Bases for the Statute

Same-sex behavior is not like a racial classification when it comes to establishing equal protection claims. It was unnecessary for African-Americans to create a record to prove that they were similarly situated with white or Anglo-Americans in cases like *McLaughlin v. Florida*, 379 U.S. 184 (1964). As the Court explained:

> [W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

McLaughlin, 379 U.S. at 191-92 (citations omitted). In view of the Fourteenth Amendment, there was no reason to weigh

[5]Public Health *Amici*'s reliance upon *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975), to argue that a public health concern cannot support a statute unless the interest was expressed in legislative history, is misplaced. *See* APHA *Amicus* Brief at 7. *Weinberger* addressed sex-based discrimination, which receives heightened scrutiny, and the opinion does not even mention rational basis as a standard of review. Furthermore, subsequent legislative history, upon which the APHA also relies, has little bearing on original legislative intent, and no bearing on whether a statute supports a legitimate public interest. *See Central Bank of Denver, N.A. v. First Interstate Bk. of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute'") (citation omitted). Because Texas already had a law against same-sex sodomy when additional penalties were proposed, the failure to make punishment more severe does not mean that the legislature decided that same-sex sodomy does not implicate public health concerns. *Cf.* APHA *Amicus* Brief at 6 (arguing that the legislature rejected public health arguments).

evidence about whether racial minorities should be treated differently–the United States Congress and a majority of the states had already made that determination. There is no similar constitutional determination for same-sex behavior.

Petitioners made no effort in the trial court to prove a lack of rational relationship between the sodomy law and legitimate public interests. Furthermore, they have created no record from which this Court could conclude that the Texas same-sex sodomy law is without a rational basis.

C. Petitioners Are Asking the Court to Find Facts *de novo*

Absent record evidence to negate every conceivable basis to support the statute, Petitioners are, in effect, asking this Court to engage in *de novo* fact finding. They are asking the Court to weigh medical evidence, without the benefit of expert testimony or cross examination, and find that same-sex sodomy does not raise a public health concern. That is not an appellate function nor even a judicial function. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (Court of Appeals "should not simply have made factual findings on its own"); *FCC v. Beach Communications*, 508 U.S. at 313 ("equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices").

Indeed, the legislature is far better positioned for resolving disputes about moral issues and the public health than are courts. That is why Texas courts defer to the legislature on matters of public concern. *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (1995) ("'[T]he question of what is a "suitable" law is not within the power of a court to decide. By its very nature, it is a political question committed to the legislature because it calls for pure public-policy decisions beyond a court's competence'") (citation omitted); *see also Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985) (reversing holding that Texas sodomy statute violated equal protection clause: "The finding of the district court, to the effect that no rational basis exists for prohibiting this manner of sexual conduct, is a

legislative finding and not an adjudicative fact finding"). This Court should likewise defer to the legislature. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid").

II. The Prohibition of Same-sex Sodomy Is Rationally Related to the State's Interest in Public Health

A. The State Has a Legitimate Interest in Regulating Public Health

This Court has long recognized the validity of state regulation of public health and morality.[6] *Railroad Co. v. Husen*, 95 U.S. 465, 470-71 (1877) (state's police power "is generally said to extend to making regulations promotive of domestic order, morals, health and safety"). Soon after ratification of the Fourteenth Amendment, this Court held that it did not affect a state's police power:

> But neither the [Fourteenth] amendment–broad and comprehensive as it is–nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people . . . .

Barbier v. Connolly, 113 U.S. 27, 31 (1884); *see also L'Hote v. City of New Orleans*, 177 U.S. 587, 596 (1900) ("It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals"). The Court has continued to recognize the valid exercise of police powers promoting public health and morality in recent years. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) ("Erie's efforts to protect public health and safety are clearly within the city's police powers"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation").

[6]This brief will address only the public health interest, since the State and other *amici* are addressing the public morality interest.

B. Same-sex Sodomy Raises Public Health Issues

1. STDs in general

The incidence and prevalence[7] of sexually transmitted diseases have grown exponentially since the sexual revolution of the 1960's and 1970's. The Centers for Disease Control ("CDC") estimates that "more than 65 million [Americans] are currently living with an incurable sexually transmitted disease (STD). An additional 15 million people become infected with one or more STDS each year, roughly half of whom contract lifelong infections." *Tracking the Hidden Epidemics: Trends in STDs in the United States 2000* at 1 (citation omitted).[8] As the CDC noted in its most recent STD surveillance report, "'[a]ll Americans have an interest in STD prevention because all communities are impacted by STDs and all individuals directly or indirectly pay for the costs of these diseases. *STDs are public health problems . . . .*'" CDC, *Sexually Transmitted Disease Surveillance 2001* at v, Division of STD Prevention (September 2002) (citation omitted; emphasis added).[9]

The CDC has identified men who have sex with men as among the groups that "are most vulnerable to STDs and their

[7]It is important to distinguish between incidence and prevalence of diseases. Incidence refers to "the development of new cases of a disease in a population free of the disease," while prevalence refers to "the number of persons who have a disease in a population at one point in time." Gary D. Friedman, M.D., S.M., *Medical Usage and Abusage: "Prevalence" and "Incidence,"* 84 Annals of Internal Medicine 502, 502 (1976). As the prevalence of a disease increases, absent intervention, the incidence will increase as well. But if a majority of a susceptible population has contracted a disease with no cure, the incidence ultimately will decrease until new people are added to the risk pool. Thus, a decline in the incidence of a disease does not necessarily mean that it is no longer a public health concern.

[8]Available at www.cdc.gov/nchstp/dstd/Stats_Trends/Trends2000.pdf.

[9]Available at www.cdc.gov/std/stats/TOC2001.htm.

consequences . . . ." *Id.* at 39 (Introduction to "Special Focus Profiles"). One reason that men who have sex with men are at high risk of STDs is the nature of anal sex. Anal sex is not the same as sexual intercourse because of the differences between the vagina and the anus.[10] "The vagina is surrounded by thick muscular tissue which distends and changes shape to accommodate the erect penis during intercourse." Jeremy Agnew, *Some Anatomical and Physiological Aspects of Anal Sexual Practices*, 12 Journal of Homosexuality No. 1, 75, 91 (Fall 1985). The nature of these muscles make them "capable of protecting against abrasion during intercourse . . . ." *Id.* In contrast, the anus has a far more limited capacity to expand because it is firmly attached to the tail bone, and it is vulnerable to tears at its point of attachment. Because the anus is surrounded by veins and arteries, any tears may lead to substantial bleeding. *See* Keith L. Moore, CLINICALLY ORIENTED ANATOMY 385 (2nd ed. 1985). Accordingly, receptive anal sex may cause physical trauma to the anus and the rectum:

> the lining of the rectum consists of a single layer of [membranous cellular tissue] with numerous goblet [mucous secreting] cells. The function of this thin layer is to promote the absorption of water and electrolytes. In spite of the limited protective capacity of secreted mucus from the goblet cells, the mucosa is incapable of much mechanical protection against abrasion. . . .
>
> . . . One of the commonest problems associated with anal sexual activity is tearing of the anal canal. The external anal sphincter is biologically intended to have material pass through it out of the body. The sudden or forceful insertion of objects in the "reverse" direction stimulates the anal reflex and produces a natural

[10]Texas Penal Code § 21.01(3) defines "sexual intercourse" in a medically correct sense as "any penetration of the female sex organ by the male sex organ." Anal sex does not qualify as sexual intercourse under Texas law or medical definitions. *See* STEDMAN'S POCKET MEDICAL DICTIONARY 151 (coitus), 381 (sexual intercourse) (1987).

> tendency of the sphincter to contract to prevent insertion. Unlike the vagina, the anus and rectum lack a natural lubricating function, and insertion of unlubricated objects or inadequate dilation prior to the insertion of large objects can result in the tearing of perianal and anal canal tissue.

Agnew, 12 Journal of Homosexuality at 91; *see also* Stephen E. Goldstone, M.D., THE INNS AND OUTS OF GAY SEX: A MEDICAL HANDBOOK FOR MEN 4 (1999) ("An anal tear can occur during the initial phase of anal sex"); William G. Eckert, M.D., & Steven Katchis, *Anorectal Trauma*, 10 The American J. of Forensic Medicine and Pathology 3, 5 (1989) (anal sex "can cause tears and resultant bleeding or other complications").

The frequency or total number of instances of receptive anal sex appears to have an influence on the degree of trauma and the likelihood of contracting STDs. As noted in the Journal of Homosexuality:

> Frequent anorectal sexual activity, whether it is repeated anal intercourse, frequent enemas, or continued insertion of objects into the rectum, may cause irritation of the rectal mucosa and produce a variety of anorectal problems. Symptoms may include anorectal pain, diarrhea, overproduction of mucus, flatus, purulent discharge, intestinal cramps, painful defecation, fecal leakage, hemorrhoids, anal or rectal ulceration and fissures, pruritus ani, or varying degrees of rectal prolapse.

Agnew, 12 Journal of Homosexuality at 90-91. A study of incontinence among men who practice receptive anal sex "revealed an excess of minor anal incontinence amongst anoreceptive homosexual men. Over a third of AR subjects reported some degree of anal incontinence or urgency of defaecation [sic]." A.J.G. Miles, et al., *Effect of Anoreceptive Intercourse on Anorectal Function*, 86 Journal of the Royal Society of Medicine 144, 146 (March 1993). The study also found a cumulative effect from repeated anal sex: "The correlation between maximum resting pressure and estimated number of partners suggests that the damage to the internal sphincter is a

cumulative effect." *Id.*; *see also* Goldstone, INNS AND OUTS at 19 ("Repeated injuries cause cumulative damage and, in later life, may lead to incontinence").

The nature of the anus and rectum and the trauma that may accompany receptive anal sex makes anal sex an efficient mode of transmitting disease. Injuries to the anal canal during anal sex are not necessarily considered serious absent complicating factors. *See* A.W. Martin Marino, M.D., & Hugo W.N. Mancini, M.D., *Anal Eroticism*, Surgical Clinics of North America No. 3, 513, 515 (June 1978) ("Tears of the anal canal may be a consequence of anal intercourse and, if so, will usually heal spontaneously"). However, anal tears cause bleeding, and thus the mixing of blood with other bodily fluids, feces and any disease organisms present. The result is the transmission of numerous STDs, including a number of diseases that are not ordinarily transmitted sexually. The diseases transmitted include anal gonorrhea, syphilis, anal warts, herpes simplex virus and enteric [intestinal] pathogens, including giardiasis, shigellosis, amebiasis and hepatitis B. *Id.* at 514; Anne Rompalo, M.D., *Sexually Transmitted Causes of Gastrointestinal Symptoms in Homosexual Men*, 74 Medical Clinics of North Am. No. 6, 1633, 1634-35 (November 1990); William F. Owen, Jr., M.D., *Sexually Transmitted Diseases and Traumatic Problems in Homosexual Men*, 92 Annals of Internal Medicine 805 (1980). The enteric pathogens historically have not been transmitted sexually, but have become somewhat common among men who have sex with men: "These infections are [usually] associated with the ingestion of fecally contaminated food or water. Certain sexual practices, especially analingus, may allow direct exposure to these pathogens and thus promote transmission of *Campylobacter, Shigella, Salmonella, Entamoeba histolytica, Giardia*, and several other enteric pathogens." Anne M. Rompalo, M.D., *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 Clinical Infectious Diseases Suppl. 1, S84, S87 (1999); Marino & Mancini, 58 Surgical Clinics of North America at 514

("Giardiasis, shigellosis, and amebiasis are being reported with increasing frequency in homosexual males").

The prevalence of these sexually transmitted diseases among men who have sex with men led to the coining of a concept called the "gay bowel syndrome." Henry L. Kazal, M.D., et al., *The Gay Bowel Syndrome: Clinico-Pathologic Correlation in 260 Cases*, 6 Annals of Clinical and Laboratory Science, No. 2, 184, 185 (1976). The "gay bowel syndrome" ultimately was used to describe over 50 infections or conditions. Michael Scarce, *Harbinger of Plague: A Bad Case of Gay Bowel Syndrome*, 34 Journal of Homosexuality No. 2, 1, 7 (1997). Critics of the concept pointed out that the diseases were not limited to men who have sex with men, not all of the diseases included in the concept occur in the bowel, and the diseases do not technically constitute a "syndrome." *Id.* at 7-12.[11] However, the point of the concept of the "gay bowel syndrome" was that physicians were beginning to identify sexually transmitted diseases that had not previously been associated with sexual activity. *See* N. Sohn, & J.G. Robilotti, *The Gay Bowel Syndrome: A Review of Colonic and Rectal Conditions in 200 Male Homosexuals*, 67 American J. of Gastroenterology 478, 478 (1977). "Gay bowel syndrome" became a short-hand way of referring to the newly-identified STDs, which were often combined with more familiar STDs among men who have sex with men. *See* Thomas C. Quinn, M.D., *Gay Bowel Syndrome: The Broadened Spectrum of Nongenital Infection*, 76 Postgraduate Medicine, No. 2, 197, 197 (1984); Owen, 92 Annals of Internal Medicine at 805.

Despite criticisms of the "gay" in "gay bowel syndrome," there is a definite association between sexually transmitted enteric pathogens and men having sex with men:

> Several enteric infectious agents, including hepatitis A, Shigella, Entamoeba histolytica, Giardia lamblia, Enterobius vermicularis and, perhaps, Salmonella, have

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[11]Scarce attacked the concept of "gay bowel syndrome" as "blatant medical homophobia." *Id.* at 2.

> become increasingly apparent in homosexual men. Enteric pathogens may be sexually transmitted by ingestion during oral anal sexual exposure (anilingus), or when fellatio or anal insertive intercourse occurs with a partner whose penis has been contaminated by previous anal intercourse. Anorectal disease in homosexual men may thus be caused by a variety of enteric pathogens, as well as by the common sexually transmitted pathogens . . . .

Thomas C. Quinn, M.D., et al., *The Etiology of Anorectal Infections in Homosexual Men*, 71 The American Journal of Medicine 395, 395 (1981) (citations omitted). Quinn et al. noted that "[i]n New York City, the prevalence of infection with giardiasis and/or amebiasis ranged from 30 percent to 40 percent in homosexual men." *Id.* at 400 (citations omitted). Moreover, "[i]n San Francisco, Seattle and New York, from 30 percent to 70 percent of the patients with shigellosis were homosexual men." *Id.* at 401 (citations omitted). Hepatitis B virus ("HBV") was also more prevalent in men who have sex with men:

> Serologic surveys of groups of homosexual men have shown that 50% to 75% have evidence of previous or current infection with HBV, and it has been estimated that in the United states alone more than 100,000 homosexual men are carriers of hepatitis B surface antigen (HbsAg). Only parenteral drug users have comparable rates of infection. *Prevalence rates for homosexual men exceed those for heterosexual partners of HbsAg-positive persons*, suggesting that the sexual activities of homosexual men lead to a greater frequency of exposure to infectious virus or provide more efficient routes of transmission.

Neil E. Reiner, M.D., et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men with Persistent Hepatitis B Virus Infection: Evidence for de facto Parenteral Transmission*, 96 Annals of Internal Medicine 170, 170 (1984) (citations omitted; emphasis added). Although rates of HBV have decreased, the

CDC recently reported that men who had sex with men (1-2 percent)[12] accounted for nearly one-third of the sexually-transmitted cases of HBV. *Tracking the Hidden Epidemics* at 23.[13]

There is some evidence that certain STDs among men who have sex with men are different from and perhaps more dangerous than similar STDs among other populations. A recent report from Seattle, Washington confirmed prior studies which found that anorectal chlamydial and gonococcal (gonorrhea) infections in men who have sex with men involve different strains of the disease than those found among heterosexuals in the same area. William M. Geisler, M.D., et al., *Epidemiology of Anorectal Chlamydial and Gonococcal Infections Among Men Having Sex With Men in Seattle: Utilizing Serovar and Auxotype Strain Typing*, 29 Sexually Transmitted Diseases No. 4, 189, 194 (April 2002). These differences have been prevalent for twenty years. *Id.* at 194. The most alarming finding is that a significant amount of these strains of disease among men who have sex with men in the Seattle area are resistant to several antibiotics.[14] *Id.* at 191; *see also* Quinn, et al., 71 The

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[12]A 1993 report from the Alan Guttmacher Institute found that only 1.1% of 3,321 men surveyed were exclusively homosexual, and only 2.3% had engaged in sex with another man *in the prior ten years*. John O.G. Billy, et al., *The Sexual Behavior of Men in the United States*, Family Planning Perspectives, Alan Guttmacher Institute (March/April 1993). Another random survey found that about 2 percent of the men surveyed had sex with a man in the prior 12 months. Robert T. Michael, et al., SEX IN AMERICA: A DEFINITIVE SURVEY 175 (1994). A survey of 34,706 students in grades 7-12 found that 1 percent reported any homosexual experience. Gary Remafedi, et al., *Demography of Sexual Orientation in Adolescents*, 89 Pediatrics No.4, 714, 719 (1992). No random survey has found significantly higher percentages of men who have sex with men on a regular basis.

[13]Forty percent of acute HBV infections "were attributed to high-risk heterosexual practices–more than one partner in the prior six months, history of other STDs–and 18 percent were associated with homosexual activity." *Id.* The rest of the HBV infections were not transmitted sexually.

[14]The incidence of the infections among men who have sex with men was also significant in that the infections increased considerably from 1997-1999 in comparison with 1994-1996. *Id.* at 190.

American J. of Medicine at 398 (suggesting that anorectal gonorrhea in homosexuals tends to be resistant to penicillin).

There have been numerous reports assuming that men who have sex with men are practicing "safer" sex, and that rates of serious STDs have declined. *See* Rompalo, 28 Clinical Infectious Diseases at S84 (citing studies). In fact, in late 2001, the CDC reported that syphilis was on its way to being eliminated. CDC Press Release, *U.S. Syphilis Rate Declines to All-Time Low in 2000*, Office of Communication (Nov. 28, 2001).[15] However, rates of high-risk behavior and STDs among men who have sex with men have risen dramatically over the past several years. Slightly less than a year after its press release reporting an all-time low rate of syphilis, the CDC reported an increase in syphilis rates of "15.4 percent between 2000 and 2001, an increase that coincided with outbreaks among gay and bisexual men in several U.S. cities." CDC Press Release, *Overall Syphilis Rate Rises for First Time Since 1990*, Office of Communication (Nov. 1, 2002).[16] The increase in syphilis among men who have sex with men was reportedly dramatic in a number of cities, including at least San Francisco, Los Angeles, New York, Chicago, Denver, Minneapolis and Columbus, Ohio. *See* CDC, *Primary and Secondary Syphilis–United States, 2000-2001*, 51 Morbidity and Mortality Weekly Report ("MMWR") No. 43, 971, Table 2 (Nov. 1, 2002); *see also San Francisco Monthly STD Report*, San Francisco Department of Public Health (August 2002) (more than double the number of cases, and "[m]ore than 90% of early syphilis cases are among gay and bisexual men");[17] Associated Press Newswires, *Syphilis Outbreak in Los Angeles County Leads to Calls for More Testing*, 12/27/02 APWIRES 02:40:00 ("The number of syphilis cases reported by gay men in Los Angeles County has increased 62 percent"); Christine Haughney, *Syphilis Rises Among N.Y. Gay Men; Experts Fear Data Point to Increase in*

[15]Available at www.cdc.gov/od/oc/media/pressrel/r011128.htm.

[16]Available at www.cdc.gov/od/oc/media/pressrel/r021101b.htm.

[17]Available at www.dph.sf.ca.us/Reports/STD/STD0208.pdf.

Risky Sexual Activity, The Washington Post, 2002 WL 101064118 (Sept. 27, 2002) (CDC "reported that syphilis cases in the city more than doubled . . . and 81 percent of the cases the health department surveyed involved men with male partners"); Jimmy Greenfield, *Syphilis Outbreak Raises HIV Fears*, Chicago Tribune, 2002 WL 102895528 (Nov. 19, 2002) (although the number of cases in Chicago decreased, "the percentage of cases involving gay or bisexual men soared to 57 percent from 15 percent"); Bill Scanlon, *Spike in Syphilis Alarms Officials*, Rocky Mountain News, 2002 WL 9108181 (Aug. 1, 2002) ("syphilis is surging in the Denver area, especially among gay men"); Associated Press Newswires, *Cases of Syphilis Among Gay and Bisexual Men Increases*, 10/1/02 APWIRES 04:27:00 ("MINNEAPOLIS (AP) - Syphilis cases among gay and bisexual men in Minnesota have increased tenfold this year compared with last, according to the state health department"); Editorial & Comment, *Fighting Syphilis*, The Columbus Dispatch, 2002 WL 100598949 (Sept. 23, 2002) ("Syphilis cases in men jumped an astounding 80 percent last year, more than offsetting a dramatic decrease among women of almost 29 percent").[18]

2. HIV

Even worse than the concerns about syphilis itself is the threat of HIV as the result of syphilis infections. One of the consequences of a high prevalence of syphilis and other STDs in men who have sex with men is that "STDs, and the behaviors

[18]STDs, and in particular HPV (human papilloma virus), appear to be associated with anal cancer. Accordingly, men who have sex with men have a significantly higher risk of anal cancer in comparison with men who do not. Mads Melbye, et al., *Changing Patterns of Anal Cancer Incidence in the United States, 1940-1989*, 139 American J. of Epidemiology No. 8, 772, 778 and Table 2 (1994). The risk of anal cancer is even higher for AIDS victims. Goedert, J.J., et al., *Spectrum of AIDS-associated Malignant Disorders*, 351 The Lancet 1833, 1836 (June 20, 1998). A history of anal sex appears to increase the risk of anal cancer for men and women. Frisch, M., et al., *Sexually Transmitted Infection as a Cause of Anal Cancer*, 337 New England Med. J. No. 19, 1350, 1352-53 and Table 2 (1997).

associated with them, increase the likelihood of acquiring and transmitting HIV infection . . . ." CDC, *Sexually Transmitted Disease Surveillance 2001* at 65 (Special Focus Profile, "STDs Among Men Who Have Sex with Men"). In regard to syphilis, the "lesions increase risk of HIV transmission between two and five times . . ." CDC Press Release, *Overall Syphilis Rate Rises for First Time Since 1990*. Indeed, in Chicago, "[u]p to 70 percent of gay and bisexual men infected in recent outbreaks have tested positive for HIV . . . ." Greenfield, *Syphilis Outbreak Raises HIV Fears*. Therefore, the increases in syphilis infections among men who have sex with men is no minor health concern.

"With the emergence of AIDS and identification of HIV, unprotected anal intercourse was reported to be the most efficient mode of sexual transmission of HIV infection." Anne M. Rompalo, M.D., *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 Clinical Infectious Diseases Suppl. 1, S84, S84 (1999); *see also* Goldstone, INNS AND OUTS at 16 ("an anus is the highest-risk place for STDs"). That is particularly problematic for men who have sex with men, for a survey of 5,000 homosexual men in 4 metropolitan areas found that "over 80% had engaged in receptive anal intercourse with at least some of their partners in the previous two years." R.A. Kaslow, et al., *The Multicenter AIDS Cohort Study: Rationale, Organization and Selected Characteristics of the Participants*, 126 American J. of Epidemiology No. 2, 310 (1987). Despite the small number of men who have sex with men (*supra* note 12), the CDC has reported that "[r]esearchers estimate that men who have sex with men (MSM) still account for 42 percent of new HIV infections annually in the United States and for 60 percent of all new HIV infections among men." *Tracking the Hidden Epidemics* at 4. But these percentages are likely significantly underestimated for several reasons. First, they do not appear to include the number of men in the risk category of men who inject drugs *and* have sex with men. Second, the risk category has not been identified in nearly a third of cases reported to the

CDC of HIV in men, and in 2001 the risk category was not identified for 51% of new cases of HIV in men. CDC, *U.S. HIV and AIDS Cases Reported Through December 2001*, Year-end edition Vol. 13, No. 2, Table 6.[19] Perhaps more importantly, a recent CDC study found that most HIV-infected men who have sex with men *do not know they have HIV*:

> More than three-fourths of young gay and bisexual men infected with HIV were unaware of their status–including 91 percent of African-American MSM–and may have unknowingly transmitted the virus to their partners, according to a study led by CDC's Duncan McKellar. Researchers surveyed 5,719 MSM between the ages of 15 and 29 in six major U.S. cities, of whom 573 tested positive for HIV; 440 men (77 percent) were unaware of their infection. . . . Of the 440 men who were unaware of their infection, 59 percent perceived themselves to be at low or very low risk of being infected.[20]

CDC Press Release, *New CDC Studies Shed Light on Factors Underlying High HIV Infection Rates Among Gay and Bisexual Men*, 2-3, CDC Office of Communication (July 10, 2002).[21] In another study reported in the same Press Release, "researchers found the rate of new HIV infections among men who have sex with men (MSM) to be *nine times higher* than among women and heterosexual men." *Id.* at 1 (emphasis added).

Men who have sex with men may be responsible for a significant amount of heterosexual transmission of HIV as well, for nearly 41 percent of women with AIDS acquired it from men. CDC, *Basic Statistics*, Division of HIV/AIDS Prevention.[22] It is unlikely that many American men acquire HIV

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[19] Available at www.cdc.gov/hiv/stats/hasr1302.htm.

[20] The number of HIV positive men who are unaware of their condition renders irrelevant Public Health *Amici*'s argument that "there is no risk of transmission where both partners are free of the virus." APHA Brief at 16.

[21] Available at www.cdc.gov/od/oc/media/pressrel/r020710.htm.

[22] Available at www.cdc.gov/hiv/stats.htm. Of the total of 141,048 cases of AIDS in females, 57,396 are from heterosexual contact.

from women because HIV is not easily transmitted from females to males. *See* Bruce Voeller, Ph.D., *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior No. 3, 233, 264 (1991) ("female partners infected anally (or any other way) are much less likely to communicate HIV sexually to their partners than are anal-receptive homosexual or bisexual males . . . Western females *tend* to be terminators in infectivity chains") (emphasis original).[23] Thus, many of the men who infect females are likely to have acquired HIV/AIDS by having sex with men. *See id.* at 237 (noting risk from bisexual men).

3. Oral sex

Oral sex also results in the spread of HIV/AIDS and other STDs. According to the CDC, HIV, "[h]erpes, syphilis, gonorrhea, genital warts (HPV), intestinal parasites (amebiasis), and hepatitis A are examples of STDs which can be transmitted during oral sex with an infected partner." CDC, *Preventing the Sexual Transmission of HIV, the Virus that Causes AIDS: What You Should Know about Oral Sex*, HIV/AIDS Update (December 2000).[24] A number of the diseases associated with men who have sex with men, particularly the enteric pathogens, are most likely transmitted through an oral/anal or penile/anal/oral route. Marino & Mancini, 58 Surgical Clinics of North America at 514 ("Sexual transmission of [enteric pathogens] is a possible consequence of oro-anal, ano-genital, and genito-oral contact either separately or in sequence"). One study expressed surprise at finding that oral-anal sex "was the single most important practice associated with infection [with hepatitis B surface antigen] . . . ." Reiner, et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men . . .*, 96 Annals of Internal Medicine at 170. Human herpes virus 8, "a necessary etiologic

[23]African men are more likely than American men to acquire HIV from females because of the prevalence of untreated STDs in Africa. *Id.*

[24]Available at ftp://ftp.cdcnpin.org/Updates/oralsex.pdf. The CDC defines "oral sex" as oral-penile, oral-vaginal or oral-anal contact. *Id.*

agent of Kaposi sarcoma," also appears to be spread by oral sex between men who have sex with men (but seldom in opposite-sex couples). Dennis H. Osmond, Ph.D., et al., *Prevalence of Kaposi Sarcoma-Associated Herpesvirus Infection in Homosexual Men at Beginning of and During the HIV Epidemic*, 287 Journal of the Am. Medical Ass'n No. 2, 221 (2002).

C. Same-sex Sodomy Is More Harmful to the Public Health than Is Opposite-sex Sodomy

1. Men who have sex with men

A large body of medical literature gives vocal testimony to the high rate of STDs and enteric diseases among men who have sex with men in comparison with the population at large. *See, e.g.*, Mitchell Bernstein, M.D., *Sexually Transmitted Diseases Including AIDS*, American Society of Colon and Rectal Surgeons, 1999 Core Subjects (1999);[25] Rompalo, *Diagnosis and Treatment of Sexually Acquired Proctitis and Proctocolitis: An Update*, 28 Clinical Infectious Diseases at S84; Voeller, *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior at 264-65; Rompalo, *Sexually Transmitted Causes of Gastrointestinal Symptoms in Homosexual Men*, 74 Medical Clinics of North Am. at1633; Reiner, et al., *Asymptomatic Rectal Mucosal Lesions and Hepatitis B Surface Antigen at Sites of Sexual Contact in Homosexual Men with Persistent hepatitis B Virus Infection: Evidence for de facto Parenteral Transmission*, 96 Annals of Internal Medicine at 170; William W. Darrow, Ph.D., et al., *The Gay Report on Sexually Transmitted Diseases*, 71 American J. of Pub. Health No. 9, 1004 (1981); Quinn, et al., *The Etiology of Anorectal Infections in Homosexual Men*, 71 The American J. of Medicine at 395; Owen, *Sexually Transmitted Diseases and Traumatic Problems in Homosexual Men*, 92 Annals of Internal Medicine at 805; Richard R. Babb, M.D., *Sexually Transmitted Infections in Homosexual Men*, 65 Postgraduate Medicine No. 3, 215 (1979). As an insurance company recently stated in its

[25]Available at www.fascrs.org/coresubjects/1999/std/std.html.

magazine for physicians, "if you do not know your patient's sexual orientation, you may not connect their symptoms to a *host of diseases and conditions more commonly associated with GLBT persons*." Aetna, 4 Physician News, 3 (December 2002) (emphasis added).

2. Men who have sex with women

Several relatively recent studies have attempted to show that there is more opposite-sex sodomy than same-sex sodomy. *See, e.g.*, Janice I. Baldwin, Ph.D., & John D. Baldwin, Ph.D., *Heterosexual Anal Intercourse: An Understudied, High-Risk Sexual Behavior*, 29 Archives of Sexual Behavior No. 4, 357 (2000); Daniel T. Halperin, Ph.D., *Heterosexual Anal Intercourse: Prevalence, Cultural Factors, and HIV Infection and Other Health Risks, Part I*, 13 AIDS Patient Care and STDs No. 12, 717 (1999); Pamela I. Erickson, Dr.P.H., et al., *Prevalence of Anal Sex Among Heterosexuals in California and Its Relationship to Other AIDS Risk Behaviors*, 7 AIDS Education & Prevention No. 6, 477 (1995); Voeller, *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior at 233.[26]

Even if the reports of anal sex among opposite-sex couples are accurate, which is questionable (as noted below), that does not place opposite-sex sodomy on the same level of public health concern as same-sex sodomy.[27] The risks associated with anal sex for opposite-sex couples is simply not the same

[26]Public Health *Amici*'s citation of Pamela Bean, *Containing the Spread of HIV Infection among High-Risk Groups*, 21 American Clinical Laboratory 19 (June 2002), for a study demonstrating the prevalence of opposite-sex couples having anal sex is puzzling. *Cf.* APHA *Amicus* Br. at 13. Bean did not purport to study the prevalence of anal sex, but made a passing reference to a 1960's study by Masters and Johnson, which was by no means representative--Masters and Johnson studied couples who were willing to be observed while having sex. *See* Robert T. Michael, SEX IN AMERICA: A DEFINITIVE SURVEY 21-22 (1994).

[27]In fact, if there is an extensive amount of opposite-sex sodomy, that only serves to highlight the greater health risk of same-sex sodomy, since the few men who have sex with men have such a high percentage of certain STDs.

as for same-sex couples. The extent of STDs associated with same-sex sodomy is likely related to the high frequency of sex, anonymous or multiple sex partners, and other high-risk behaviors. *See* Rompalo, 74 Medical Clinics of N. Am. at 1634. In contrast, "most women are less likely than MSM to be sexually involved with someone who is HIV-positive, have numerous sexual partners, or to engage in high frequencies of anal intercourse or other AIDS/STD-related risk behaviors . . . ."[28] Halperin, 13 AIDS Patient Care and STDs at 721. Moreover, as Voeller pointed out, Euro-American women are not effective at spreading HIV, even through anal sex. 20 Archives of Sexual Behavior at 264-65. Thus, the HIV risk for heterosexuals is minimal unless women have sex with men who have also had sex with men. *See id.* at 237 ("Bisexual men pose possibly greater risk to women," and women who have sex with bisexual men are more likely to engage in anal sex); CDC *Basic Statistics* (less than 5% of men with AIDS were exposed heterosexually; nearly 3 times as many women were exposed to AIDS heterosexually). In addition, "[t]o date, sexually transmitted anorectal infections have not been reported as a consequence of" anal sex among opposite-sex couples. Rompalo, 28 Clinical Infectious Diseases at S85.[29]

[28]High frequencies of receptive anal sex have been associated with increased risk of HIV transmission. In a study of 114 women in the Bronx who had steady partners with AIDS, "[t]he *number of episodes of anal intercourse* was the only independent predictor of HIV seropositivity ($p < 0.01$) in a multiple logistic regression analysis of various sex practices." Voeller, *AIDS and Heterosexual Anal Intercourse*, 20 Archives of Sexual Behavior at 235 (emphasis original).

[29]The quotation is somewhat ambiguous as to whether the author is referring to all opposite-sex couples who practice anal sex or just college students and adolescents, which were the closest antecedents to the author's pronoun ("these subpopulations"). Regardless, the medical literature does not identify anorectal infections among opposite-sex couples as comparable to those who practice same-sex sodomy. If anorectal infections were common among opposite-sex couples, they would surely be found in college students and adolescents who reportedly practice anal sex.

There may be far less sodomy among opposite-sex couples than the above studies estimate. One might well anticipate that those who truly believe their sexual behavior is private would be unwilling to discuss it with strangers, and there is evidence to support that expectation. As Baldwin & Baldwin pointed out, several studies have "found that more liberal and sexually experienced people are more likely to volunteer for studies of sexual behavior than are conservative people . . . ." Baldwin & Baldwin, 29 Archives of Sexual Behavior at 367. Accordingly, a less than 100 percent response rate to a sexual survey "could bias [] results and show more sexual activity than would have been found if all [survey recipients] had responded." *Id.* Of the two studies cited above that actually undertook a survey of anal sexual behavior, Baldwin & Baldwin had a response rate of 53-55 percent, and Erickson, et al., had a response rate of 47 percent. *Id.*; Erickson, et al., 7 AIDS Education and Prevention at 479.[30] Thus, the reported prevalence of heterosexual anal or oral sex may be exaggerated.[31] *Cf.* Thomas A. Peterman, M.D., et al., *Risk of Human Immunodeficiency Virus Transmission from Heterosexual Adults with Transfusion-Associated Infections*, 259 Journal of the American Medical Ass'n No. 1, 55, 57 (1988) ("Unlike studies of gay men or female partners of bisexual men, this study found no evidence of an association of

[30]The only random sex survey to date that has had a fairly high response rate is the National Health and Social Life Survey, which had less than an 80 percent response rate. Robert T. Michael, et al., *Sex in America: A Definitive Survey* 30, 33 (1994). In fact, the response rate was only 72 percent if Appendix A to the book correctly reports the number of participants at 3,159. *Id.* at 247.

[31]One researcher observed that "in discussing heterosexual anal intercourse with many hundreds of physicians–chiefly in obstetrics and gynecology–most seem embarrassed or even shocked that such practices occur, or that they, as physicians, ought to intrude into them a [sic] part of patient care." Voeller, 20 Archives of Sexual Behavior at 241. If hundreds of physicians are shocked to hear that opposite-sex couples have anal sex, perhaps the prevalence is far less than Voeller believes–the physicians would surely not be shocked if they themselves engaged in the practice.

infection with anal-receptive intercourse, but anal intercourse was infrequent in this study population") (citations omitted).

3. Women who have sex with women

Research regarding diseases associated with same-sex behavior in women "has only recently begun," so the public health implications of female homosexual conduct are not as well documented as for men. Kathleen M. Morrow, Ph.D., Jenifer E. Allsworth, A.B., *Sexual Risk in Lesbians and Bisexual Women*, 4 Journal of the Gay and Lesbian Med. Ass'n No. 4, 159 (2000). Nevertheless, female same-sex conduct does impact public health. "Although the risk of transmission of certain STDs between women remains unclear, it has been reported that human papillomavirus (HPV) occurs among women who self-identify as lesbian, as do trichomoniasis and anogenital warts among those who report never having had sex with men." *Id.* at 159 (citations omitted). In addition, "[p]robable female-to-female transmissions of HIV have been reported in the medical literature since 1984." *Id.* (citations omitted). In their original research, Morrow and Allsworth found that:

> A majority of respondents reported multiple episodes of unprotected sex every month that involved the potential exchange of body fluids linked to the transmission of HIV and other STDs (i.e., vaginal secretions and semen) as well as possible exposure to blood through menstrual fluid and engaging in S/M activities.– Furthermore, women who self-identify as lesbian or bisexual reported other factors often associated with the transmission of HIV and other STDs, including the previous diagnosis of STDs and multiple sex partners. In fact, 26 % reported a previous STD diagnosis . . . .

Id. at 163.[32] The authors concluded that their research "not only confirms that lesbian and bisexual women engaged in sexual behaviors traditionally accepted as risky by the prevention

[32]The STDs reported include "crabs," gonorrhea, chlamydia, genital herpes, genital warts and syphilis. *Id.* at 161, Table I.

community, but also engaged in high frequencies of sexual risk behaviors that, although not proven vehicles of HIV transmission, could potentially bring the AIDS epidemic into a low prevalence community."[33] *Id.* at 164.

Women who have sex with women have also been found to be at increased risk for bacterial vaginosis ("BV"). Barbara J. Berger, et al., *Bacterial Vaginosis in Lesbians: A Sexually Transmitted Disease*, 21 Clinical Infectious Diseases 1402 (1995). Researchers at a public women's clinic and a private practice in New York City examined 101 women who have sex with women, including 21 "pairs":

> The concordance between the sexual partners with respect to vaginal secretions strongly suggests that BV is sexually transmitted in lesbians. The prevalence of BV in our population of lesbians (29%) can be compared with lower prevalences seen in a university health service gynecology clinic (19%) and a family practice clinic (17%) and with prevalences seen in sexually transmitted diseases clinics (24%-37%).

Id. at 1403 (citations omitted). BV is also associated with other infections: "bacterial vaginosis is believed to be the cause of one-third to one-half of all infectious vaginal conditions." Richard L. Sweet, M.D., *Gynecologic Conditions and Bacterial Vaginosis: Implications for the Non-Pregnant Patient*, 8 Infectious Diseases in Obstetrics and Gynecology 184,185 (2000). Moreover, "[d]ata from several large-scale studies suggests a potential role for BV in HIV transmission." *Id.* at 188. Women with BV appear to be at significantly higher risk of contracting HIV than women without BV. *Id.*

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[33]The authors noted that there is an assumption that women who have sex with women are at lower risk than other sexually active persons, but "[t]he actual mechanisms of female-to-female sexual transmission remain essentially unknown . . . ." *Id.* They also suggested the possibility that the large number of female AIDS victims whose risk category has not been identified may be the result of the CDC not tracking "data relevant to female-to-female transmission." *Id.* at 160.

4. HIV/AIDS

Public Health *Amici* attempt to equate HIV/AIDS risk for opposite-sex couples with the risk in same-sex sodomy. APHA *Amicus* Brief at 12. They assert that sexual intercourse is "an increasingly common means of HIV transmission in the United States," and "the leading route of HIV transmission" worldwide.[34] *Id.* As already noted, Euro-American women tend to be the end of an HIV infection chain, and do not tend to pass HIV to men. Voeller, 20 Archives of Sexual Behavior at 264-65. The worldwide mode of transmission is not pertinent to America because there are fewer STDs among American men who have sex with women. *Id.* at 264.

More importantly, Public Health *Amici* misleadingly mix statistics regarding HIV and AIDS.[35] After asserting an increase in HIV transmission through sexual intercourse, they cite a CDC report about a sharp decline in AIDS among men who have sex with men. APHA Brief at.12. However, before discussing the sharp decline in AIDS, the CDC report noted that "[s]ince the use of highly active antiretroviral therapy [] became widespread during 1996, trends in AIDS incidence have become less reflective of underlying trends in HIV transmission," and that "HIV surveillance data have not been avail-

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[34]The sources cited do not support the proposition that sexual intercourse is "an increasingly common means of HIV transmission in the United States." As an article co-authored by the current CDC director, Dr. Julie Louise Gerberding, pointed out, the probability of HIV transmission (without condoms) for receptive anal sex is 0.8-3.2 percent, for receptive sexual intercourse is 0.05-0.15 percent, and for insertive anal sex or sexual intercourse is 0.03-0.09 percent. Mitchell H. Katz, M.D. and Julie Louise Gerberding, M.D., M.P.H., *Postexposure Treatment of People Exposed to the Human Immunodeficiency Virus Through Sexual Contact or Injection-Drug Use*, 336 New England J. of Medicine No. 15, 1097 (1997).

[35]HIV and AIDS are not the same thing, although HIV is a precursor to AIDS. AIDS "is the late stage of infection with [HIV] and is characterized by severe immunosuppression and co-infection with other opportunistic agents." Texas *HIV/STD Annual Report 2001* at 5, Texas Dept. of Health Bureau of HIV & STD Prevention. Current drug therapy "delays the progression from HIV infection to AIDS." *Id.*

able nationwide . . . ." CDC, 13 *HIV/AIDS Surveillance Report* No. 2, 5 (Sept. 25, 2002).[36] Thus, the current incidence of AIDS has little bearing on the incidence of HIV transmission. In addition, although the CDC reported that heterosexual transmission of AIDS "seems to have increased" from 1998 to 2001, the 2001 number of heterosexual transmissions was less than the 1996 number, and far fewer than the new AIDS cases among men who have sex with men. *Id.* at 35 and Table 27.

Public Health *Amici* point to "an 'increasing spread of new infections among females'" in Texas. APHA Brief at 13 (quoting Texas *HIV/ STD Annual Report 2001*, Texas Dept. of Health Bureau of HIV & STD Prevention[37]). They also note that "women now account for half of all reported cases of adult HIV infection." *Id.* (citing CDC, *Basic Statistics*). What the Public Health *Amici* leave out (in purporting to provide the Court with "accurate scientific information," *id.* at 1) is far more significant than what they said. Men who have sex with men, perhaps 2 percent of the U.S. population (*supra* note 12), account for 60 percent of Texas men with HIV/AIDS, 63 percent of the cumulative number of AIDS cases in U.S. men, and over 51 percent of all U.S. AIDS cases. Texas *HIV/STD Annual Report* at 9; CDC, *Basic Statistics*.[38] It is hardly disputable that the incidence and prevalence of HIV/AIDS is substantially higher among men who have sex with men than in the community at large, and that the disproportionate statistics are the result of "anal sex combined with multiple partners." Gabriel Rotello, SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN 75 (1998). That alone makes same-sex sodomy an overwhelming public health issue.

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[36]Available at www.cdc.gov/hiv/stats/hasr1302.pdf.

[37]Available at www.tdh.state.tx.us/hivstd/legislature/2001.pdf.

[38]These numbers include men who have sex with men and inject drugs. In Texas approximately 7.5 percent of men with HIV/AIDS inject drugs and have sex with men; nationwide, the percentage of men with AIDS who inject drugs and have sex with men is about 7.7 percent.

D. There Is No Foundation for the Argument that the Sodomy Law Impedes the Effectiveness of AIDS Prevention Efforts

Public Health *Amici* misleadingly claim that there has been a decrease in HIV transmission rates among men who have sex with men as states have decriminalized sodomy laws. APHA Brief at 19 and n.12 (citing CDC). The CDC report cited actually refers to a reduction in the incidence of new AIDS cases as a result of the widespread use of highly active antiretroviral therapy. CDC, 13 *HIV/AIDS Surveillance Report* at 5. In fact, the evidence shows an *increase* in HIV transmission rates among men who have sex with men. And the Public Health *Amici*, particularly the APHA, should know this–the APHA recently published an article in its journal that referred to data that "suggest that rates of new [HIV] infections may be starting to increase." Richard J. Wolitski, et al., *Are We Headed for a Resurgence of the HIV Epidemic Among Men Who Have Sex With Men?*, 91 American J. of Pub. Health No. 6, 883 (2001); *see also* CDC, *HIV Incidence Among Young Men Who Have Sex With Men–Seven U.S. Cities, 1994-2000*, 50 MMWR No. 21, 440, 440 (2001) ("Twenty years after the first report on [HIV] infection in the United States, studies of [STDs] and sexual behaviors suggest a resurgent HIV epidemic among men who have sex with men"); CDC Press Release, *New CDC Studies* ("In one of the largest studies on HIV incidence in the U.S., CDC researchers provided *further evidence of high rates of HIV infection among gay and bisexual men*. . . . The researchers estimated that 4.8 percent of MSM were infected annually") (emphasis added).

It is also misleading to suggest that "educational efforts" about "safer sex" are successfully reducing the risk of HIV/AIDS. *Cf.* APHA Brief at 19 (citing articles from 1994 and 1996). Any public health organization should be well aware that "successes" from the hundreds of millions of dollars spent on AIDS education are ephemeral. As the APHA's journal reported, "[d]ata from the Multicenter AIDS Cohort Study show that over a 2-year period, 47% of men returned to unpro-

tected receptive anal intercourse and 44% returned to unprotected insertive anal intercourse." Wolitski, 91 American J. of Pub. Health at 884. Moreover, the CDC has been reporting "increases in unsafe sexual behavior" among men who have sex with men in cities with major educational efforts for the past several years. CDC, *Increases in Unsafe Sex and Rectal Gonorrhea Among Men Who Have Sex With Men–San Francisco, California, 1994-1997*, 48 MMWR No. 3, 45, 45 (1999).[39]

There is no evidence–and in particular no record evidence–that the same-sex sodomy law prevents Texans from seeking or obtaining accurate public health information about HIV transmission. *Cf.* APHA Brief at 20.[40] The UNAIDS handbook quoted by the Public Health *Amici* may have relevance for Saudi Arabia, but not for Texas. For example, Dallas County has made "anonymous HIV counseling and testing" available for years. CDC, *Condom Use and Sexual Identity Among Men Who Have Sex With Men–Dallas, 1991*, 42 MMWR No. 1, 7, 7 (1993). Moreover, Texas spent over $23 million on prevention efforts in 2001. Texas *HIV/STD Annual Report 2001* at 4.

[39]It may be that some young men are actively seeking HIV infection. *See* Gregory A. Freeman, *Bug Chasers: The Men Who Long to Be HIV+*, Rolling Stone 915 (February 6, 2003) (estimating that 25% of new HIV cases are the result of "bug chasing"). Lesbian writer Tammy Bruce suggests that public health officials' retractions or denials of quotations in *Bug Chasers* was the result of "extraordinary pressure" by "gay activist[s]." Tammy Bruce, *Bug Chasers and the Thought Police*, NewsMax.com (Jan. 29, 2003), www.newsmax.com/archives/articles/2003/1/29/95042.shtml.

[40]Nor is there evidence that the Texas law prevents patients from being honest with their physicians or prevents them from getting tested or seeking treatment. *Cf. id.* at 21. The only source cited that relied on evidence rather than speculation involved 3 men discussed in a 1992 article. *See* Scott Dunbar & Susan Rehm, *On Visibility: AIDS, Deception by Patients, and the Responsibility of the Doctor*, 18 Journal Med. Ethics 180 (1992). And one case, *Campbell v. Sundquist*, 926 S.W.2d 250, 263-64 (Tenn. Ct. App. 1996), relied upon "evidence" (3 men?) provided by *amicus* APHA.

IV. RATIONALITY DOES NOT REQUIRE TEXAS TO TREAT SAME-SEX SODOMY LIKE OPPOSITE-SEX SODOMY

The issue under rational-basis review is not whether opposite-sex sodomy raises public health issues, but whether same-sex sodomy does. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (citation and internal quotation marks omitted). Rather, legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting others." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). That is what the Texas legislature did in 1973 when it chose to decriminalize opposite-sex sodomy, but to retain the criminal prohibition of same-sex sodomy. Texas may have made a bad decision in decriminalizing opposite-sex sodomy. But the Fourteenth Amendment does not require the State to take an all-or-nothing approach to legislation.

The same-sex sodomy law need not be supported by any empirical evidence that it has actually furthered a public interest. *See FCC v. Beach Communications, Inc.*, 508 U.S. at 315. However, it is noteworthy that Texas does not have the same extent of HIV/AIDS among men who have sex with men as San Francisco, where same-sex sodomy is legal, and even glorified through events like the San Francisco Folsum Street Fair. Compare Texas *HIV/STD Annual Report 2001* at 9 (approximately 60 percent of cumulative AIDS cases in men are MSM) with San Francisco Dept. of Pub. Health, *HIV/AIDS Epidemiology Annual Report 2001* at 9, HIV/AIDS Statistics and Epidemiology Section (over 94 percent of cases in men and 90 percent of all AIDS cases are MSM).[41] Furthermore, as a British study noted, the legalization of same-sex sodomy in

[41]Available at www.dph.sf.ca.us/Reports/STD/HIVAIDSAnnlRpt2001.pdf. The percentages include men who have sex with men and inject drugs (7.5% in Texas and 13% in San Francisco).

England correlated with an upsurge in a variety of STDs among men who have sex with men. J.L. Fluker, *A 10-year Study of Homosexually Transmitted Infection*, 52 British J. of Venereal Disease No. 3, 155 (1976).

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the Texas Court of Appeals.

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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS, *Respondent.*

On Writ of Certiorari to the
Court of Appeals of Texas, Fourteenth District

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Center for Law and Justice International Supporting Respondent

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STATE OF TEXAS, *Respondent*.

On Writ of Certiorari to the
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Motion of the Center for Law and Justice International as Amicus Curiae in Support of Respondent

Pursuant to Supreme Court Rule 37.4 (b), the Center for Law and Justice International (CLJI) seeks leave to file a brief amicus curiae in support of respondent. In support of its motion, the CLJI states:

1. The CLJI has received consent to file its brief from counsel for the respondent in this case. A copy of that letter of consent is being submitted along with this motion.

2. On February 14, 2003 counsel for the CLJI spoke over the telephone with Ruth E. Harlow, counsel for the Petitioner. Ms. Harlow informed CLJI counsel that they would not consent to the filing of the CLJI amicus brief.

3. As noted more fully in the Interest of Amicus, the CLJI is a lay Catholic legal organization that, among other policy positions, opposes efforts to take public debates on moral issues out of the legislative process by minting new substantive due process rights. The CLJI thus urges the Court to reaffirm its decision in *Bowers v. Hardwick*. Based on an examination of the Petition for Certiorari and the briefs supporting and opposing that petition, CLJI counsel believe that the CLJI's brief brings relevant matter to the Court that is not already before the Court and will be of help to the Court in deciding this case.

WHEREFORE, the CLJI respectfully asks that this Court grant the CLJI leave to file its brief amicus curiae in support of respondent.

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INTEREST OF AMICUS*

The Center for Law and Justice International (CLJI) is a project of Catholics United for Life, a lay Catholic 501 C (3) organization. The CLJI seeks to advance the Catholic perspective on human life and human sexuality issues through litigation, education, and similar activities in accordance with the Magisterium of the Catholic Church.

As a public interest advocacy effort, the CLJI is dedicated to preventing the erosion of traditional moral values via judicial fiat. The CLJI opposes efforts to take public debates on moral issues out of the legislative process through the minting of new rights under the Due Process Clause of the Fourteenth Amendment. Accordingly, the CLJI urges this Court to reaffirm its holding in Bowers v. Hardwick that the Due Process Clause contains no fundamental right to engage in homosexual sodomy.

SUMMARY OF THE ARGUMENT

This Court should deny Petitioners' request that this Court overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986) by locating in the Due Process Clause a broad new right to intimate association and sexual intimacy between consenting adults. Such a right has absolutely no basis in the Constitution's text, or this nation's history or legal tradition. Moreover, such a right would fly in the face of this Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997) which embraced, in its entirety, the approach to substantive

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* This brief is filed upon Motion to the Court. Pursuant to Rule 37.6, amicus CLJI discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

due process analysis set forth in *Bowers*. Of particular significance in *Glucksberg* was the Court's insistence that new liberty interests asserted under the Due Process Clause be described with careful specificity. 521 U.S. at 721. Breezy general descriptions serve only to heighten the risk that the Court's decision will be nothing more than the "policy preferences" of some its Members. *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977).

Similarly, this Court must reject Petitioners' effort to bootstrap a right to sexual intimacy onto substantive due process rights with a historical pedigree, such as marriage. Nothing in this Nation's history or legal tradition supports Petitioners' assertion that all sexual intimacy between consenting adults is morally equivalent, and therefore entitled to the same protection as the marital relationship. To the contrary, this Court's decisions establish that the only sexual relationship that is rooted in this Nation's concept of ordered liberty is marriage. *Loving v. Virginia*, 388 U.S. 1 (1967). The Court's primary concern in *Griswold v. Connecticut*, 381 U.S. 479 (1965) was with protecting the privacy of the marital relationship, not sex qua sex. *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (describing the importance of sexual intimacy to *family life* (not individual gratification)). Within the past two decades, this Court has rejected every effort to bootstrap new substantive due process rights onto existing rights. The Court should not carve an exception in this case.

State laws decriminalizing various sexual relationships and protecting homosexuals from certain kinds of discrimination fall far short of constituting the abiding national consensus required under *Glucksberg*'s approach to substantive due process analysis. Such laws may prove that 1) society, at present, is more tolerant of alternative sexual lifestyles, or 2) criminalizing certain sexual behavior is

unwise social policy. They come nowhere close to establishing that this country regards all sex between consenting adults as worthy of the highest protection under the Constitution. To the contrary, many other laws demonstrate a national consensus that homosexual sodomy, as well as other sexual relationships outside marriage, are inferior and can never attain to the same legal status as marriage.

Finally, and most importantly, overruling *Bowers v. Hardwick* and holding that a right of intimate association including all sexual activities between consenting adults is a fundamental right will eventually wreak havoc on many of the Nation's laws governing marriage. All such laws, including laws against adultery, polygamy, polyandry, and incest become susceptible to the claim that they burden the right to intimate association and thus deserve strict scrutiny. As this Court well knows, very few laws survive strict scrutiny.

If society is in fact moving toward a national consensus about sexual morality, then the foundational principle of collective self-government requires this Court to permit the States to follow their chosen courses. Forcing the States' hands without any basis in Constitutional text or legal history will threaten the Court's legitimacy and undoubtedly cause the same national discord occasioned the last time this Court found a new substantive due process right that was untethered to Constitutional text or national history. *See Roe v. Wade*, 410 U.S. 113 (1973).

ARGUMENT

For at least two decades now, this Court has been leery of "turning any fresh furrows in the 'treacherous field' of substantive due process." *Troxel v. Granville*, 539 U.S. 57, 76 (2000) (Souter, J., concurring). As Justice Powell explained in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977):

> [W]e "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.

Id. at 502; *see also Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

Bowers v. Hardwick, 478 U.S. 186 (1986) echoed this Court's historic commitment generally to abstain (with the exception of the abortion cases) from grafting new rights onto the Due Process Clause unless the asserted rights "are so rooted in the traditions and conscience of our people," *Snyder v. Massachussetts*, 291 U.S. 97, 105 (1934) as to be "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Writing for the majority in *Bowers*, Justice White reiterated:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Bowers, 478 U.S. at 194. *Bowers* has been seen as controversial[1] largely because the Court properly declined Mr. Hardwick's invitation to describe the asserted right to

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[1] *See, e.g.*, William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 Vand. L. Rev. 419, 426 (1997) (labeling, with stunning hyperbole, *Bowers* "the most uniformly criticized decision in my lifetime"). The Court's decisions *expanding* substantive Due Process rights, *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973) have, of course, generated far greater national discord than *Bowers* has, and have themselves been the subject of trenchant scholarly criticism. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973).

homosexual sodomy broadly as a right of privacy or liberty. "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. An exhaustive survey of state statutes criminalizing sodomy in effect when the Constitution was ratified and when the Fourteenth Amendment was passed produced the Court's conclusion that "[a]gainst this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

I. *BOWERS V. HARDWICK* SHOULD BE REAFFIRMED BECAUSE ITS ENTIRE APPROACH TO SUBSTANTIVE DUE PROCESS ANALYSIS WAS AFFIRMED IN *WASHINGTON V. GLUCKSBERG.*

A. Petitioners' Attempt to Characterize Sodomy as a Right to Intimate Association Flies in the Face of this Court's Insistence in *Glucksberg* that New Rights Asserted Under the Due Process Clause Be Described with Careful Specificity.

This Court resolved any lingering controversy about whether new rights asserted under the Due Process Clause should be defined with careful specificity in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither

> liberty nor justice would exist if they were sacrificed." Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause.

Id. at 720-21 (internal citations omitted). Thus, this Court refused to accept the Respondent's characterization of the issue as whether the Due Process Clause provides a right for mentally competent, terminally ill adults to "bring about impending death in a certain, humane and dignified manner." See Brief for Respondents at i, *Washington v. Glucksberg*, 521 U.S. 702. Rather, the issue precisely defined was whether the Due Process Clause "includes a right to commit suicide which includes a right to assistance in doing so." 521 U.S. at 723.

A careful description of the asserted liberty interest is crucial lest the Due Process Clause be transformed into nothing "more than the policy preferences of the members of this Court." *Moore v. City of East Cleveland*, 431 U.S. at 502. *See also Glucksberg*, 521 U.S. at 722 (A careful description of the asserted liberty interest "tends to rein in the subjective elements that are necessarily present in substantive due process review"). Breezy generalities like "the privacy of the home," or the right to make choices "about private, consensual sexual relations," see Pet. Br. at 11, are too broad, and suggest facile conclusions that serve no purpose other than to obscure the real issue. As Professor Michael McConnell has trenchantly observed:

We might be able to agree on highly generalized principles like "human dignity," "fair play," or "equal concern and respect," but how those abstractions will apply to such specific questions as affirmative action, capital punishment, or proper modes of service of process (to name a few examples) is a matter of disagreement among reasonable people. The attraction of natural law is its seemingly universal reasonableness; but specific applications to specific issues lose that quality of universality. When a court announces that the abstract principle of "equal concern and respect" mandates (or precludes) affirmative action, or the principle of personal autonomy mandates (or precludes) assisted suicide, the judge is not in any realistic sense "applying" natural law, but is merely applying his own opinion about affirmative action or assisted suicide. There is no reason the judge's opinion should prevail over that of the people.

Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 682-83.

B. Glucksberg Requires Rejection of Petitioners' Attempt to Bootstrap a New Right to Sexual Intimacy Onto Other Fundamental Rights.

This Court repeatedly has rejected efforts to bootstrap new rights to extant fundamental rights on the grounds that there is (allegedly) little difference between them. Most recently in *Glucksberg*, the Court dismissed the argument that there is no constitutionally significant difference

between the fundamental right to refuse medical treatment and the right to assisted suicide:

> The right assumed in Cruzan, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.

521 U.S. at 725; *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) ("freedom from physical restraint" did not include the right "of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution."); *Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989) (right to sanctity of family relationships does not translate into a right by a natural father to assert parental rights over a child born into a woman's existing marriage with another man, who raised the child as his own).

In each case, the history and legal traditions behind the asserted right were central to the Court's decisions. *Glucksberg*, 521 U.S. at 711-16; *Reno*, 507 U.S. at 303 ("the

mere novelty of such a claim is reason enough to doubt that substantive due process sustains it"); *Michael H.*, 491 U.S. at 126-27. *See also Jackson v. Rosenbaum*, 260 U.S. 22, 31 (1922) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it").

This Court's reliance on history and tradition is at bottom an act of profound judicial humility that serves the end of collective self-government. For the Court to assert without fairly explicit textual support that the Constitution affords fundamental protections to activities that the people and their elected legislators historically have restricted or even prohibited would negate the people's authority to govern themselves by laws of their own making. As Michael McConnell has pointed out

> When judges base their decisions either on constitutional text or on *longstanding* consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitments of the people. No single vote, no single electoral victory, no single jurisdiction suffices to establish a tradition: it requires the acquiescence of many different decision makers over a considerable period of time, subject to popular approval or disapproval.

See McConnell, *supra*, 1997 Utah L. Rev. at 682 (emphasis added).

The right to homosexual sodomy, or any sex outside the marital relationship, may implicate choices about

intimate associations, but this Court's substantive due process cases as well as the Nation's legal traditions and current legal practices establish that the marital relationship has always been regarded "as quite distinct," *id.*, from other sexual relationships. Thus, Petitioners' extensive reliance on *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) is unavailing.

In *Griswold*, the Court was concerned not with protecting sex qua sex, but with the privacy of the marital relationship. The Court saw marriage as a "noble" institution, "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." 381 U.S. at 486. The Connecticut law forbidding the use of contraceptives

> seeks to achieve its goals by means having a maximum destructive impact upon [the marital] relationship.... Would we allow the police to search the sacred precincts of *marital* bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the *marriage* relationship."

Id. at 485-86 (emphasis added).[2]

---

[2] Petitioners also quote language from *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) in arguing that sexual relations between two consenting adults is a constitutional right: "Sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" Pet. Br. at 12 (quoting Slaton, 413 U. S. at 63). *Slaton* offers no support for Petitioners' insinuation that the Court adopted their "anything goes between two consenting adults" approach to sexual morality as a governing constitutional standard. *Slaton* emphasizes first of all that this Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) was concerned with protecting sexual intimacy within the marital

Eisenstadt lends no more support to Petitioners' argument than does *Griswald*. First, of all the case involved an Equal Protection Clause challenge, 405 U.S. at 446,[3] but even more importantly the case is properly understood as supporting the right to decide whether to bear children, not a right to consensual adult sex. In response to the state's assertion that the law was intended to discourage sexual immorality, the Court did not say that the state's purpose was illegitimate. Rather, the Court held that the law did not serve the asserted purpose. *Id.* at 448.

C. There Is No Stable, Enduring National Consensus That A Right to Engage In Homosexual Conduct Is "Implicit In the Nation's Concept of Ordered Liberty.

While attitudes toward sexual morality, including homosexuality have undoubtedly grown more tolerant in the past two decades, it would be a gross overstatement to say that the nation has reached a stable and abiding consensus that the right to homosexual sodomy is implicit in the nation's concept of ordered liberty. Thirteen states still criminalize consensual sodomy.[4] Many states deny

relationship. 413 U.S. at 65. Second, *Slaton* rejected the very premise underlying Petitioners' argument, which is that the term 'sexual morality' is oxymoronic, at least between consenting adults. *See id.* at 60 (quoting a sociologist who opined that the viewing of obscene pornography with its emphasis on "abnormal and distorted" sexual practices can have a deleterious effect on the mental health of the individual).

[3] The Court expressly stated it was not addressing the question whether the law violated a fundamental right under the Due Process Clause. 405 U.S. at 447 n.7

[4] Ala. Code § 13A-6-65(a)(3) (2002); Fla. Stat. § 800.02 (2002); Idaho Code § 18-6605 (2002); Kan. Stat. Ann. § 21-3505 (2002); La. Rev. Stat. Ann. § 14:89 (2002); Miss. Code Ann. § 97-29-59 (2002); Mo. Rev. Stat. § 566.090 (2002); N.C. Gen. Stat. § 14-177 (2002); Okla. Stat. tit. 21, §

homosexual couples the ability to adopt children. *See, e.g.*, Ex Parte J.M.F., 730 So. 2d 1190 (Ala. 1998).[5] No state confers a marriage license on homosexual couples, and efforts to persuade the nation that homosexual intimate relationships must be treated equally with heterosexual marriage have been overwhelmingly repudiated. *See, e.g.*, Alaska Const. art. I, § 25 (2002); Hawaii Const. Art. I, § 23 (2002); Neb. Const. Art. I, § 29 (2002).[6]

886 (2002); S.C. Code Ann. § 16-15-120 (2002); Tex. Penal Code Ann. § 21.06 (Vernon 2002); Utah Code Ann. § 76-5-403 (2002); Va. Code Ann. § 18.2-361 (Michie 2002).

[5] According to the Lambda Legal Defense Funds website, more than half of all states do not permit homosexual couples to adopt children. *See* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?

[6] *See also* Ala. Code § 30-1-19 (2002); Alaska Stat. § 25.05.013 (Michie 2002); Ariz. Rev. Stat. § 25-101 (2002); Ark. Code Ann. § 9-11-109 (2002); Cal. Fam. Code § 308.5 (Deering 2003); Col. Rev. Stat. 14-2-104 (2002); Del. Code Ann tit. 13, § 101 (2002); Fla. Stat. Ann. § 741.212 (West 2002); Ga. Code Ann. § 19-3-3.1 (2002); Haw. Rev. Stat. § 572-1 (2002); Idaho Code § 32-201 (Michie 2002); 750 Ill. Comp. Stat. 5/213.1 (2003); Ind. Code Ann. § 31-11-1-1 (Michie 2002); Iowa Code § 595.2 (2002); Kan. Stat. Ann. § 23-101 (2001); Ky. Rev. Stat. Ann. §§ 402.005 & 402.020 (Michie 2002); La. Civ. Code Ann. art. 89 & 3520 (West 2003); Me. Rev. Stat. Ann. tit. 19-A, § 701 (2001); Md. Code Ann., Fam. Law § 2-201 (2002); Mich. Comp. Laws § 551.1 (2002); Minn. Stat. § 517.03 (2002); Miss. Code Ann. § 93-1-1 (2002); Mo. Rev. Stat. § 451.022 (2002); Mont. Code Ann. § 40-1-401 (2002); Nev. Rev. Stat. 122.020 (2002); N.H. Rev. Stat. Ann. §§ 457:1 & 457:2 (2002); N.C. Gen. Stat. § 51-1.2 (2002); N.D. Cent. Code § 14-03-01 (2002); Okla. Stat. tit. 43, § 3.1 (2003); 23 Pa. Cons. Stat. § 1704 (2002); S.C. Code Ann. § 20-1-15 (2002); S.D. Codified Laws § 25-1-1 (Michie 2002); Tenn. Code Ann. § 36-3-113 (2002); Utah Code Ann. § 30-1-2 (2003); Vt. Stat. Ann. tit. 15, § 8 (2002); Va. Code Ann. § 20-45.2 (2002); Wash. Rev. Code § 26.04.010 (2002); Wis. Stat. § 765.001 (2002); Wyo. Stat. Ann. § 20-1-101 (Michie 2002).

In 1996, the federal government passed The Defense of Marriage Act, which reflects a national policy judgment that the marital relationship is to be preserved as a union between "one man and one woman," not available to homosexual couples, or for that matter, any other relationships. 1 U.S.C. § 7 (2000). The United States Military forbids open homosexual relationships among members of the armed services. *See* The National Defense Authorization Act, 10 U.S.C. § 654 (1993). There is obviously no enduring national consensus about the legitimacy of homosexual relationships.

In any event, the trend toward more tolerance of homosexual relationships cuts against Petitioners' argument that this Court now must force the States' hands. The current pace of change counsels against the draconian step of overruling a prior decision and declaring sexual intimacy between consenting adults a new fundamental right. The Court's last attempt to constitutionalize its view of what direction the Country's morals ought to take, in *Roe v. Wade*, has resulted in a quarter century (and continuing) of profound national discord over the issue. Justice Ginsburg's observations about the political climate surrounding *Roe v. Wade* now serve as a warning:

> the political process was moving, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.

Ruth Bader Ginsburg, *Some Thoughts on Autonomy & Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 385-86 (1985).

II. A DECISION TO REVERSE *BOWERS V. HARDWICK* WOULD INVALIDATE MANY LAWS REGULATING MARRIAGE AND FAMILY RELATIONS IN THIS COUNTRY.

A broadly-defined new fundamental right for consenting adults to engage in any and all sexual activities, would have profound legal implications for every law touching upon sexual relationships. Despite Petitioners' assurances to the contrary,[7] there is no principled means of drawing the line between homosexual sodomy and adultery, polygamy, or incest, as long as the participants are consenting adults. Other sexual relationships outside marriage have no better historical pedigree than homosexual sodomy. *See generally* Morris Ploscowe, *Sex and the Law* 142 (1951); John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 22 (1988). Even swinging clubs or ménage a trois would be a part of this new fundamental right, since such practices are just one more permutation of the right to intimate association.

Certainly, the first casualty of such a broadly defined right would be the invalidation of state laws proscribing both sodomy and fornication. Even now, despite widespread

[7] Petitioners blandly assert that bigamy and incest laws are not threatened because they serve state interests in protecting the marriage contract, as well as persons, such as children, who cannot truly consent to sex. Pet. Br. at 17. Of course, these interests evaporate if the parties to the marriage consent to mutual adultery, or in the case of incest, the parties are adults who can freely consent.

social acceptance of unmarried cohabitation, thirteen states and the District of Columbia still criminalize fornication.[8]

Laws proscribing incest would be constitutionally suspect as applied to consenting adults. Aunt Bea has a constitutional right to sexual intimacy with Andy, because "control over one's body is fundamentally at stake in sexual relations, involving as they do the most intimate physical interactions conceivable." See Pet. Br. at 10.

Far more significant, however, would be the eventual effect of such a right on this Country's laws regulating the institution of marriage. If sexual intimacy with the partner(s) of one's choice is a fundamental right, certainly, the decision to end an intimate association is central to that choice. Thus, divorce laws become subject to strict scrutiny. Indeed, Kenneth Karst, applying a supposed right to "intimate association" concluded in 1980 that a constitutional right to no-fault divorce exists. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L. J. 624, 637-38, 671-72 (1980); *see also* David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marq. L. Rev.

[8] D.C. Code Ann. § 22-1602 (2002); Fla. Stat. § 798.02 (2002) (criminalizing lewd and lascivious cohabitation of unmarried individuals); Ga. Code Ann. § 16-6-18 (2002); Idaho Code § 18-6603 (2002); 720 Ill. Comp. Stat. 5/11-8(2002) (criminalizing fornication if open and notorious); Mass. Gen. Laws ch. 272, § 18 (2002); Mich. Comp. Laws § 750.335 (2002) (criminalizing lewd and lascivious cohabitation of unmarried people); Minn. Stat. § 609.34 (2002); Miss. Code Ann. § 97-29-1 (2002) (criminalizing habitual fornication); N.C. Gen. Stat. § 14-184 (2002) (criminalizing fornication when lewd and lascivious cohabitation occurs); N.D. Cent. Code § 12.1-20-10 (2002) (criminalizing open and notorious cohabitation of unmarried people); S.C. Code Ann. § 16-15-60 (2002) (criminalizing fornication when cohabitation or habitual intercourse are present); Utah Code Ann. § 76-7-104 (2002); Va. Code Ann. § 18.2-344 (Michie 2002); W. Va. Code § 61-8-3 (2002).

975, 984 (1992) (discussing Karst's theory of intimate association).

Similarly, laws against adultery are threatened. Nearly half of the states still criminalize adultery.[9] Such laws would arguably "burden" Fred's and Wilma's constitutional right to sexual intimacy with Barney and Betty, individually or all together. Provided they are all consenting adults who derive "emotional enrichment," Pet. Br. at 10., from the liaisons, their right to engage in such conduct becomes unassailable under Petitioners' understanding of substantive due process.

Even the validity of bigamy laws would become doubtful. Polygamy (and polyandry) laws are based primarily on the moral belief that the marriage union between one man and woman is uniquely special and should be protected. *See Reynolds v. United States*, 98 U.S. 145, 164 (1898) (polygamy historically has been viewed as "odious" throughout Christendom). If all sexual intimacy between consenting adults is a fundamental right under the Due Process Clause, then state law classifications that

[9] Ala. Code § 13A-13-2 (2002); Ariz. Rev. Stat. § 13-1408 (2002); Colo. Rev. Stat. § 18-6-501 (2002); D.C. Code Ann. § 22-201 (2002); Fla. Stat. § 798.01 (2002) (criminalizing open adultery); Ga. Code Ann. § 16-6-19 (2002); Idaho Code §18-6601 (2002); 720 Ill. Comp. Stat. 5/11-7 (2002) (criminalizing adultery if open and notorious); Kan. Stat. Ann. § 21-3507 (2002); Md. Code Ann., Criminal Law § 10-501 (2002); Mass. Gen. Laws ch. 272, § 14 (2002); Mich. Comp. Laws § 750.30 (2002); Minn. Stat. § 609.36 (2002); Miss. Code Ann. § 97-29-1 (2002) (criminalizing habitual adultery); N.H. Rev. Stat. Ann. § 654:3 (2002); N.Y. Penal Law § 255.17 (Consol. 2002); N.C. Gen. Stat. § 14-184 (2002) (criminalizing adultery when lewd and lascivious cohabitation occurs); N.D. Cent. Code § 12.1-20-09 (2002); Okla. Stat. tit. 21, § 871 (2002); R.I. Gen. Laws § 11-6-2 (2002); S.C. Code Ann. § 16-15-60 (2002) (criminalizing adultery when cohabitation or habitual intercourse are present); Utah Code Ann. § 76-7-103 (2002); Va. Code Ann. § 18.2-365 (Michie 2002); W. Va. Code § 61-8-3 (2002).

burden this right, such as laws restricting marriage to one man and one woman, would become subject to strict scrutiny. In other words, if marriage is merely a contract cementing an individual's choice of an intimate associate, and all such choices are protected under the Due Process Clause, then why should the contract be limited to two parties, if the persons involved believe that their needs for intimate association are better met with three or four parties to the contract?

As with monogamy, so with marriage generally. The decision to marry is a fundamental right, *Loving v. Virginia*, 388 U.S. 1 (1968) and if homosexuals have a fundamental right to intimate sexual association, then upon what basis can they be denied the right to marry. Laws prohibiting homosexual marriage draw classifications that "burden" a fundamental right to sexual intimacy among consenting adults. Ergo, such laws would be presumptively invalid.

Petitioners' proposed right of intimate association could well have devastating effects on the institution of marriage over time. Such changes as same-sex marriage and homosexual families "will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear." Joseph Raz, The Morality of Freedom 162 (1986) (quoted in Gerard V. Bradley, Pluralistic Perfectionism: A Review of Making Men Moral, 71 Notre Dame L. Rev. 671, 695 (1996)).[10] Bradley explained further:

[10] Bradley notes that Raz "ventured no moral evaluation of the prospect" that homosexual families would become accepted in our law and culture. *See* 71 Notre Dame L. Rev. at 695.

> Why not just call or treat gay relationships as "marriage" in scare quotes or with an asterisk? Because for a time straight and gay marriage might co-exist in the law and in popular consciousness as somehow superior and inferior forms. But they will not for long. Sooner rather than later, persons will wonder, superior and inferior versions of what? The ranking presumes a common metric or a genre embracing both species. If the genre is the traditional one, gay partnerships are not inferior versions of it at all, but morally indistinguishable from what the tradition has always considered an affront against marriage: cohabitation. If marriage and gay partnership are variations on a single theme, some new ideal of domestic partnership has replaced marriage, one which has conclusively cut off our understanding of marriage as, in some decisive way, a community grounded in the complementarity of reproductive functioning.

Bradley, 71 Notre Dame L. Rev. at 695-96.

Thus, as Professor Robert George notes, "the presence or absence of a culture's commitment to, and support for, a social form such as monogamous marriage will profoundly shape the options that people will typically understand themselves to have – and the choices that they will actually make – in morally important areas of their lives." Robert P. George, Making Men Moral 165, 166 (1993). In other words, the surrounding culture, including that culture's legal norms, helps to shape people's understanding of what are or are not truly valuable forms of life and relationships. At a time when many States are

looking for ways to shore up the institution of marriage,[11] an unfettered right to "intimate association" would be devastating.

If society wishes to make changes in laws governing sexual relationships, it should do so consciously after full debate and not by dictate of a few judges who have been convinced by lawyers that there is no significant difference between the various kinds of sexual relationships in which consenting adults may participate.

[11] *See, e.g.*, Sharon Tubb, *When Government Wants Marriage Reform*, ST PETERSBURG TIMES, at 1D (February 8, 2003) (discussing ways, such as covenant marriage laws, that governments are attempting to combat societal ills associated with the breakdown of the institution of marriage).

CONCLUSION

It is one thing to say that criminal laws prohibiting sexual practices are unwise social policy because they entail unseemly police behavior. *See Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting). It is a quantum leap, however, to say that such sexual practices should be deemed a fundamental right that is deeply embedded in the Nation's history and traditions. The only sexual relationship with such a pedigree is the marital relationship.

For the foregoing reasons, this Court should reaffirm its holding in *Bowers v. Hardwick* that homosexual sodomy is not a fundamental right under the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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JOHN GEDDES LAWRENCE, ET AL.,
Petitioners.
v.
STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas
Fourteenth District

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization. Liberty Counsel has been involved in such matters as *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002), where we successfully defended against an attempt to force Georgia to recognize a Vermont civil union as the legal equivalent to a marriage, *Lofton v. Kearney*, 157 F. Supp.2d 1372 (S.D. Fl. 2001) (currently on appeal to the U.S. Court of Appeals for the 11th Circuit), where we filed an amicus brief on behalf of state legislators in support of the Florida statute that prohibits adoption by same-sex couples, *Brady v. Dean*, 790 A.2d 428 (Vt. 2001), where we challenged the Vermont civil union law on procedural grounds, and *Rosengarten v. Downs*, case no. SC-16836 (Connecticut Supreme Court) where we intervened in an effort to prevent Connecticut from recognizing a Vermont civil union.

SUMMARY OF ARGUMENT

This case has little to do with sodomy laws and everything to do with gaining full acceptance of homosexuality as an incremental step toward achieving the "right to marry, not as a way of adhering to society's moral codes but rather to . . . radically alter an archaic institution."

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Michelangelo Signorile, *Bridal Wave*, Out 161 (Dec./Jan. 1994) (www.forthechildreninc.com/issues/homosexuality/TheAgenda/InTheir OwnWords.html).

Prior decisions of this Court establish the right of states to regulate conduct that it deems harmful and immoral, particularly where that conduct conflicts with the idea that marriage is an institution between one man and one woman. Statistical evidence concerning the medical and social harms resulting from "private, consensual" same-sex sexual conduct, together with recent legislative and judicial battles, underscore the long-term, devastating consequences of a decision declaring a fundamental right to engage in private consensual same-sex sodomy. This Court, therefore, should decline Petitioners' invitation to declare privacy rights heretofore unrecognized.

ARGUMENT

I.
CERTIORARI WAS IMPROVIDENTLY GRANTED

There is no evidence in the record for this Court to rule on the questions presented in the cert petition. The record reveals only that Petitioners pled *nolo contendre* to charges that they engaged in "deviate sexual intercourse with another individual of the same sex" in violation of Tex. Pen. Code Ann. § 21.06 (Vernon 1994)[2]; Pet. App.

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[2] "Deviate sexual intercourse" is "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." Tex. Pen. Code Ann. § 21.01 (Vernon 1994).

129a; *Lawrence v. Texas*, 41 S.W.3d 349, 350 (Tex. App. 2001) ("circumstances of the offense are not in the record"). There is no evidence that the sexual act (1) was consensual, (2) was not commercial sex, (3) was done in private, out of the view of the public or anyone else present in the room, or that each man had the mental capacity to consent. In addition, there is no evidence that the men are homosexuals, thereby precluding a determination of whether they fall within a suspect class for purposes of the equal protection analysis.[3]

Despite the insufficient record, Petitioners ask this Court to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986) and recognize a fundamental right to engage in private consensual sodomy. This Court should refrain from deciding such a crucial question when it is unclear that the facts of this case bring the question squarely before the Court. *See Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers Unions v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948) (per curiam) ("Because of the inadequacy of the record, we decline to uecide the Constitutional issues involved"). Therefore, because this case does not clearly present the facts of same-sex sodomy performed in private between consenting adults, this Court should dismiss the petition as

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[3] As discussed *infra* III.B.3., the fluid nature of sexual orientation prevents identification of a class. Even if such a classification could be made, the mere fact that these two men engaged in a single sexual act together does not establish that they fall within that class.

improvidently granted.

Should this Court decline to dismiss the petition, at best, Petitioners are left with a facial challenge, which means this Court should apply the standard articulated in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (a party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be valid"). Petitioners concede there are circumstances under which the statute is valid – enforcement against those engaged in public same-sex sodomy, against a man who engages in sodomy with a man unable to consent, or in a context of same-sex prostitution. (Pet. Br. at 6, 39). The Texas law is constitutional under the *Salerno* standard, and therefore should be upheld.

II.
STATES HAVE THE RIGHT TO REGULATE HUMAN SEXUAL RELATIONS

The issue in this case is *not* the persecution of a political minority. It is the right and duty of states to regulate conduct deemed harmful to society. Ruling in Petitioners' favor can only be accomplished by ignoring prior decisions of this Court that refused to find a fundamental right to engage in private consensual sexual conduct.

That the American people remain sharply divided on homosexuality is beyond question. In many states, legislative battles are being fought concerning the scope of rights to be granted to homosexuals (including the right to adopt and marry). Petitioners, however, ask this Court to

halt the ongoing legislative processes by stripping the state legislatures of their authority to regulate acts they deem harmful and immoral. Removing "the ball from the legislators' court", however will not end the debate, it will only prolong "divisiveness" and "defer[] stable settlement of the issue" of homosexual rights. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205-08 (1992) (expressing the opinion that this Court's *Roe v. Wade* decision prolonged divisiveness on the abortion issue by halting a political process that was in a state of change). Justice Holmes similarly cautioned that the judiciary should "confine[]" itself to "molecular motions" because "[d]octrinal limbs too swiftly shaped . . . may prove unstable." *Id.* at 1198; *see also Bowers*, 478 U.S. at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

Principles of *stare decisis* dictate that this Court decline Petitioners' invitation to strip states of the right to regulate private consensual sexual conduct that harms individuals and erodes the institution of marriage.

A.
States Have the Right to Promote the Institution of Heterosexual Marriage

Petitioners invite this Court to view the Texas sodomy statute in a vacuum, ignoring the right of states to promote the institution of heterosexual marriage and how the statute falls within that legislative preference.

> [N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family as consisting in and springing from the union for life of *one man* and *one woman* in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilizations.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (rejecting constitutional challenge to a federal statute denying franchise in federal territories to those engaged in polygamous cohabitation); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL'Y 581, 598 (1999) ("Traditional marriage is a public good"). Thus, although involving consenting adults, polygamy is prohibited in all fifty states because it stands in direct conflict with the idea of "family as consisting and springing from the union for life of one man and one woman." Similarly, twenty-four states prohibit adultery.[4] State

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[4] *See* Ala. Code §13A-13-2(c); Ariz. Rev. Stat. Ann. §13-1408; C.R.S.A. §18-6-501; D.C. Code Ann. §22-301; Fla. Stat. Ann. §798.01; Ga. Code. Ann. §16-6-19; Idaho Code §18-6601; 720 Ill. Comp. Stat. Ann. §5/11-7(b); Kan. Stat. Ann. §21-3507(2); Mass. Gen. Laws Ann. ch. 272, §14; Md. Ann. Code Art. 27, §3; Mich. Comp. Laws Ann. §750.30; MSA §609.36; Miss. Code Ann. §97-29-1; N.H. R.S.A. §645:3; N.Y. Pen. L. §255.17; N.C. Gen. Stat. §14-184; N.D. C.C. §12.1-20-09; Okla. Stat. Ann. tit. 21, §872; R.I. Gen. L. §11-6-2; S.C. Code §16-15-60; Utah

regulations legitimately extend beyond the one man, one woman proscription to also prohibit incestuous marriages.[5]

Concomitant with a state's right to promote marriage as the union of one man and one woman – through proscriptions of how many, and which persons may enter into a marital relationship – so too may the states proscribe conduct, including private consensual sexual conduct, that harms individuals and erodes the institution of marriage.

B.
States Have the Right to Regulate Consensual Sexual Conduct

The law "is constantly based on notions of morality, and if all laws representing moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Bowers*, 478 U.S. at 196. While governments are "obliged to show equal respect to persons

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Code Ann. §76-7-103(2); Va. Code Ann. §18.2-365; W.Va. Code §61-8-3;Wisc. Stat. Ann. §944.16.

[5] *See, e.g.*, Ala. Code §30-1- 6; Ark. Code Ann. §9-11-106; Colo. Rev. Stat. §18-6-301; Conn. Gen. Stat. Ann. §§46b-21 & 53a-191; D.C. Code Ann. §30-101; Ga. Code Ann. §19-3-3 (1999); Kan. Stat. Ann. §21-3603; Md. Code Ann. Fam. Law §2-202; Mass. Gen. Laws Ann. ch. 207, §§1-2; Mich. Comp. Laws Ann. §551.4; Miss. Code Ann. §§93-1-1 & 97-29-5; Mo. Rev. Stat. §568.020; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. §639:2; Okla. Stat. Ann. tit. 43, §2 ; Okla. Stat. Ann. tit. 21 §885; Or. Rev. Stat. §163.525; R.I. Gen. Laws §§15-1-1 to 2; S.C. Code Ann. §20-1-10; S.D. Codified Laws §25-1-7; Tenn. Code Ann. §36-3-101.

qua persons" they are not obliged to show equal respect "to all of the persons' acts and choices." Robert P. George, MAKING MEN MORAL 102 (1993); *see also* Dent, *supra*, at 586 (government may promote or discourage conduct because it believes that the conduct benefits or harms the individual, even if the individual does not agree). Prohibiting behavior deemed unacceptable or immoral is precisely what law does: it limits one's freedom to act in ways that cause harm to the individual or to society.

States are justified in enforcing a societal morality as a means of self-preservation because "social bonds constituted by shared moral beliefs are placed in peril when the law tolerates actions that are generally considered to be wicked." George, *supra*, at 51-52, 73; *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) ("all human societies have prohibited certain activities not because they harm others but because they are considered immoral"). "Without morality, the foundations of our liberty will crumble, because there will be no moral compass differentiating between right and wrong." Stephen Daniels, *Intolerant Tolerance: The Weapon of Moral Relativism* at 4 (available at www.ncfpc.org/policypapers.html); *see also* George, *supra*, at 36-37 ("Perhaps every generation must learn for itself that 'private' immoralities have public consequences. . . . It is plain that moral decay has profoundly damaged the morally valuable institutions of marriage and the family, and has, indeed, largely undercut the understandings of the human person, marriage, and the family").[6]

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[6] In a study published in 1932, Joseph Daniel Unwin demonstrated, through the results of 7 years of research on 80

The "strength of our system" of American federalism is that it "leave[s] room for substantial variation of moral visions and legal regimes among states . . . ." Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 974 (Jan. 2002). Moral visions of the various states have led to laws criminalizing fornication (sexual relations between unmarried persons), bestiality (sexual relations with animals), necrophilia (sexual relations with dead bodies), adult-minor consensual sexual relations, consensual adult incestuous sexual relations, and in several states, including Texas, sodomy.

> There has never been any doubt that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral. Simply put, commission of what the legislature determines as an immoral act, even if consensual and private, is an injury against society itself.

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primitive tribes and on ancient and modern civilizations, that there is a "close relationship between sexual opportunity and cultural condition" – namely, that with no exception, restrictions placed on sexual opportunity outside a monogamous relationship produce the "expansive energy" necessary for the civilization to prosper and strengthen. Joseph Daniel Unwin, SEXUAL REGULATIONS AND CULTURAL BEHAVIOR 5, 30-32 (1932) ("'civilization' has been built up by sacrifices in the gratification of innate desires").

State v. Smith, 766 So.2d 501, 509 (La. 2000). Although Petitioners and their amici rely heavily on *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) and *Stanley v. Georgia*, 394 U.S. 557 (1969) as authority for a fundamental right to engage in private consensual sexual conduct, the cases do not stand for that proposition. *See Carey*, 431 U.S. at 685 (explaining that *Roe* and *Eisenstadt* address the right to be free of unwarranted governmental intrusion into the fundamental decision of whether to beget or bear a child) & at 702, 705 (White, J. concurring) (explaining that the decision in *Carey* did not declare "unconstitutional any state law forbidding extramarital sexual relations" or "require state legislation to meet the 'compelling state interest' standard whenever it implicates sexual freedom"); *Bowers*, 478 U.S. at 191 ("any claim that these cases [*Carey, Roe, Eisenstadt, Griswold*] nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable"); *Griswold*, 381 U.S. at 485 (invalidating statute that swept "unnecessarily broadly" – government attempted to control distribution of birth control through regulation of use rather than of manufacture or sale); *Stanley*, 394 U.S. at 565 (finding unconstitutional a statute that prohibited mere possession in the home, for private viewing, of obscene materials, this Court emphasized that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds").

Far from recognizing a fundamental right to engage in private consensual sexual conduct, this Court has

repeatedly emphasized that putting conduct between consenting adults "beyond state regulations, is a step [it is] unable to take." *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 68 (1973). This Court again should decline to deprive states of the power to enact statutes that proscribe harmful and immoral conduct.

An overriding theme in Petitioners' brief is that same-sex sexual activities are victimless and therefore beyond the legitimate reach of legislative proscription. (Pet. Br. at 28). Statistical evidence (much of which is published in leading homosexual magazines and newspapers) demonstrates, however, that those who engage in homosexual conduct are at increased risk for numerous diseases as compared to heterosexuals. Statistically, sexual promiscuity is increased among those who engage in homosexual conduct, the result of which is the wide-spread presence of diseases found predominantly, if not exclusively, among those who engage in homosexual conduct.

A far-ranging study published in 1978 revealed that 75% of self-identified, white, gay men, admitted to having sex with more than 100 different males in their lifetime, with 28% claiming more than 1,000 lifetime male sex partners. Alan P. Bell and Marin S. Weinberg, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 308, Table 7 (1978). A study published in 1997 produced similar results: of 2,583 homosexuals, only 2.7 percent claimed to have had sex with one partner only; the most common response, given by 21.6 percent of the respondents, was of having 101 to 500 lifetime sex partners. Paul Van de Ven *et al.*, *A Comparative Demographic and*

Sexual Profile of Older Homosexually Active Men, J. SEX RESEARCH 34 (1997). The U.S. Centers for Disease Control similarly reported an upswing in promiscuity in San Francisco: from 1994 to 1997, the percentage of homosexual men reporting multiple partners and unprotected anal sex rose from 23.6 percent to 33.3 percent, with the largest increase among men under 25. *See* John R. Diggs, Jr., M.D., *The Health Risks of Gay Sex* (available at www.corporateresourcecouncil.org) (citing *Increases in Unsafe Sex and Rectal Gonorrhea among Men Who Have Sex With Men – San Francisco, California, 1994-1997*, MORTALITY AND MORBIDITY WEEKLY REPORT, CDC, 48(3): 45-48, p. 45 (Jan. 29, 1999)); *see also* Erica Goode, *With Fears Fading, More Gays Spurn Old Preventive Message*, NEW YORK TIMES, August 19, 2001 (in the past seven years, while the practice of anal sex had increased, with multi-partner sex doubling, condom use had declined 20 percent). A 1994 survey of 2500 homosexual men published in the August 23, 1994 issue of THE ADVOCATE revealed that in the past five years 48% of the men had engaged in "three-way sex" and 24% had engaged in "group sex (four or more)." www.forthechildreninc.com/issues/homosexuality/TheAgenda/InTheirOwnWords.html.

A long-term monogamous relationship also has a different meaning among those who engage in homosexual conduct. "Gay magazines are . . . celebrating the bigger bang of sex with strangers or proposing 'monogamy without fidelity' – the latest Orwellian formulation to excuse having your cake and eating it too." Camille Paglia, *I'll Take Religion Over Gay Culture*, Salon.com online magazine, June 1998 (available at www.frontpagemag.com/archives/guest_column/paglia/gayculture.htm). Another author

praises gay male couples for realizing that sexual fidelity is not necessary to show their love for each other and advocates that gay male couples can "provide models and materials for rethinking family life and improving family law." Richard D. Mohr, *In The Case for Gay Marriage*, 9 NOTRE DAME J. L. ETHICS & PUB. POL'Y 215, 233 (1995). A recent study reveals that although 46% of gay men attending "circuit parties" claimed to have a "primary partner", 27% of those men "had multiple sex partners (oral or anal) during their most recent circuit party weekend . . . ." Gordon Mansergh, Grant Colfax, *et al.*, *The Circuit Party Men's Health Survey Findings and Implications for Gay and Bisexual Men*, AM. J. OF PUB. HEALTH 91(6): 953-58 (June 2001).

Given these staggering statistics of sexual promiscuity, the number of diseases that are found predominantly (and in some instances, exclusively) among homosexual practitioners comes as no surprise. Although nearly 64% of men with AIDS were men who have had sex with men, *Basic Statistics*, CDC DIVISION OF HIV/AIDS PREVENTION, June 2001 (available at www.cdc.gov/hiv/stats.htm), the list of diseases found with higher incidence among those engaged in homosexual conduct does not stop there. "Reports at a national conference about sexually transmitted diseases indicate that gay men are in the highest risk group for several of the most serious diseases." Bill Roundy, *STD Rates on the Rise*, NEW YORK BLADE NEWS 1, Dec. 15, 2000 ("the increased number of sexually transmitted diseases (STD) cases is the result of an increase in risky sexual practices by a growing number of gay men who believe HIV is no longer a life-threatening illness"); *see also* Jon Garbo, *Gay and Bi Men Less Likely*

to Disclose They Have HIV, GAYHEALTH NEWS, July 18, 2000 (researchers from the University of California, San Francisco found that 36% of homosexuals engaging in unprotected oral, anal or vaginal sex failed to disclose that they were HIV positive to casual sex partners) (available at www.gayhealth.com/templates/0/news?record=136).

The list of diseases found with extraordinary frequency among male homosexual practitioners as a result of anal sex include: anal cancer, chlamydia trachomatis, cryptosporidium, giardia lablia, herpes simplex virus, HIV, HPV, isospora belli, microsporidia, gonorrhea, viral hepatitis types B & C, syphilis. John R. Diggs, Jr., M.D., *The Health Risks of GaySex* 3 (available at www.corporateresourcecouncil.org). "*Sexual transmission of some of these diseases is so rare in the exclusively heterosexual population as to be virtually unknown.*" *Id.* at 3 (emphasis added). Another disease found almost exclusively among homosexual practitioners is "Gay Bowel Syndrome" – "sexually transmitted gastrointestinal syndromes." *STD Treatment Guidelines: Proctitis, Proctocolitis, and Enteritis*, (Centers for Disease Control and Prevention 1993) (available at www.ama-assn.org/special/std/treatmnt/guide/stdg3470.htm); *see also* Jack Morin, ANAL PLEASURE AND HEALTH: A GUIDE FOR MEN AND WOMEN 22 (1998) (explaining that homosexual sexual activities "provide many opportunities for tiny amounts of contaminated feces to find their way into the mouth of the sexual partner . . . the most direct route is oral-anal contact").

As for the diseases that are also found among heterosexuals, individuals engaged in homosexual conduct

constitute the largest percentage of many of those diseases, including anal cancer, HIV, HPV (a collection of viruses that can cause warts, or papillomas, on various body parts) and syphilis. For example, 85% of the syphilis cases reported in the Seattle area of Washington in 1999 were among self-identified homosexual practitioners. Diggs, *supra*, at 3-4. Syphilis among male homosexual practitioners is at epidemic levels in San Francisco. *Id.* HPV also is "almost universal" among those men. Bill Roundy, *STDs Up Among Gay Men: CDC Says Rise is Due to HIV Misperceptions*, THE WASHINGTON BLADE, Dec. 8, 2000 (available at www.washblade.com/health/a). While the incidence of anal cancer in the United States is only .9/100,000, the number soars to 35/100,000 for those engaged in homosexual conduct. Bob Roehr, *Anal Cancer and You*, BETWEEN THE LINES, Nov. 16, 2000 (available at www.pridesource.com/cgibin/article? article=3835560).

Lesbians are also at increased risk for certain diseases, including cancer, hepatitis C, and bacteria vaginosis, predominantly because they are "significantly more likely to report past sexual contact with a homosexual or bisexual man and sexual contact with an IDU (intravenous drug user)." Katherine Fethers *et al.*, *Sexually Transmitted Infections and Risk Behaviors in Women Who Have Sex with Women*, SEXUALLY TRANSMITTED INFECTIONS 345-47. Although rare, a Philadelphia woman recently tested positive for HIV as a result of "shared sex toys" with her HIV-positive bisexual female partner. *See* www.advocate.com/new_news.asp?ID=7628&sd=01/31/03.

As these statistics reveal, the Texas same-sex sodomy statute is a legitimate exercise of its police power.

III.
DEREGULATING HUMAN SEXUAL RELATIONS WILL ERODE THE INSTITUTION OF MARRIAGE

"Being queer means pushing the parameters of sex, sexuality, and family, and in the process, transforming the very fabric of society. . . . We must keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society's views of family." Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK National Gay and Lesbian Quarterly (Fall 1989); *see also* Michelangelo Signorile, *Bridal Wave*, OUT 161 (Dec./Jan. 1994) ("the most subversive action lesbians and gay men can undertake – and one that would perhaps benefit all of society – is to transform the notion of 'family' entirely").[7] There can be no doubt that a ruling which finds

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[7] The homosexual groups have significant resources to advance their agenda. *See* Paul E. Rondeau, *Homosexuality: Truth Be Told*, 14 REGENT U. L. REV. 443, 468-70 (2001-2002): *Human Rights Campaign*, the largest national homosexual lobby in the nation, claiming over 400,000 members, reports income over $16 million; *Gay and Lesbian Alliance Against Defamation* (GLAAD) is the dominant media relations and watchdog lobby of the homosexual movement with income of $4,199,134; *National Gay and Lesbian Task Force* (NGLTF) with income in excess of $3.5 million; *PFLAG*, with income of just under $1.5 million, claims membership of 76,000 with 425 local groups, promotes the idea that ignorance of homosexuality has bred a climate of torment, fear and hatred in our schools; *GLSEN* with income exceeding $1.8 million states that their mission is to fight the homophobia and heterosexism that undermine healthy school climates; *Lambda Legal Defense and Education Fund* reports income over $10,000,000.

a fundamental right to engage in private consensual sodomy will be yielded as a weapon in ongoing and future legislative and legal battles seeking special protections based on one's actual or perceived sexual orientation, as well as repeal of laws that prohibit adoption and marriage by same-sex couples. A state has a legitimate interest in preventing such an attack on the family and the institution of marriage.

A.
The Abolition of Marriage as the Union of One Man and One Woman

Marshall Kirk and Hunter Madsen articulated an elaborate strategy for achieving acceptance of gay sexuality, and ultimately of entirely transforming the notion of family. "In any campaign to win over the public, gays must be portrayed as victims in need of protection so that straights will be inclined by reflex to adopt the role of protector." AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR & HATRED OF GAYS IN THE 90'S 184. Ads should feature gays as "icons of normality." *Id.* "[I]t makes no difference that the ads are lies; not to us, because we're using them to ethically good effect . . . ." *Id.* at 154. We must plan to "desensitize straights to gays and gayness . . . ." *Id.* at 149.

> [F]irst, you get your foot in the door, by being as similar as possible; then, and only then – when your one little difference is finally accepted – can you start dragging in your other peculiarities, one by one. You hammer in the wedge narrow end first. . . . In time, as hostilities subside and stereotypes

> weaken, we see no reason why more and more diversity should not be introduced in the projected image [of gays]. This would be healthy for society as well as for gays.

Id. at 146, 186-76. This "desensitization" process is part of the strategy leading up to "conversion."

> [B]y Conversion, we actually mean something far more profoundly threatening to the American Way of Life, without which no truly sweeping social change can occur. We mean conversion of the average American's emotions, mind, and will, through a planned psychological attack, in the form of propaganda fed to the nation via the media. We mean 'subverting' the mechanism of prejudice to our own ends – using the very processes that made Americans hate us to turn their hatred into warm regard – whether they like it or not. . . . [G]ays can undermine the moral authority of homohating churches over less fervent adherents by portraying . . . [them] as antiquated backwaters, badly out of step . . . with the latest findings of psychology.

Id. at 153-54, 179.

Although written in 1987 as a *satirical* piece to mock religious foes of homosexuality, the *Homosexual Manifesto* (which was first published in GAY COMMUNITY NEWS, Feb. 15-21, 1987) is at the same time shocking in its

assertions while revealing for its similarities to the political agenda advanced today by homosexual groups. (Text of the essay is available at http://libercratic.government.direct nic.com/Journal/social/queer/homosexual_agenda.htm).

> We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. We shall seduce them in your schools . . . in your seminaries, in your youth groups, in your movie theater bathrooms . . . in your houses of Congress, wherever men are with men together. . . . All laws banning homosexual activity will be revoked. Instead, legislation shall be passed which engenders love between men. . . . There will be no compromises. We are not middle-class weaklings. . . . Those who oppose us will be exiled. . . . The family unit, which only dampens imagination and curbs free will, must be eliminated. . . . All churches who condemn us will be closed.

Id.; *cf.* David Thorstad, "ManBoy Love and the American Gay Movement," in *Male Intergenerational Intimacy: Historical, Socio-Psychological, and Legal Perspectives*, J. OF HOMOSEXUALITY 20:1-2, 255 (1990) (the "ultimate goal" is "not just equal rights for 'lesbians and gay men,' but also freedom of sexual expression for young people and children").

Like the "agenda" set forth in the "Homosexual Manifesto", current legal battles include (1) lowering the age of consent to engage in sexual conduct with adults, (2)

silencing public and private expression of opposition to the homosexual agenda, (3) repeal of State Defense of Marriage Laws (DOMAs), which refuse to grant full faith and credit to same-sex marriages entered into in other states, (4) attack of state laws that grant married spouses a right not granted to unmarried same-sex partners, (5) invalidation of state laws prohibiting adoption by same-sex couples, and (6) repeal of sodomy statutes.

It takes no stretch of the imagination to envision the consequences stemming from a recognition by this Court that there is a fundamental right to engage in private consensual same-sex sodomy. Two examples show how incremental extension of rights and benefits to those engaged in homosexual conduct lead to results that are far reaching and disastrous.

In 1999, the Vermont Supreme Court declared that same-sex couples were entitled to the same benefits and protections as married couples and mandated that the legislature enact laws to provide those benefits and protections. *See Baker v. State*, 744 A.2d 864 (Vt. 1999). Some of the reasons relied upon by the court included that (a) "Sexual Orientation is among the categories specifically protected against hate-motivated crimes in Vermont," thus belying the fact that the state frowns upon same-sex marriages, *id.*, (b) Vermont had enacted statewide legislation prohibiting discrimination on the basis of sexual orientation, and (c) Vermont had removed barriers to adoption by same-sex couples as well as extending legal rights and protections to couples who dissolve their "domestic relationship." *Id.* at 885-86. It was the incremental steps the State of Vermont took over the years

that led the Vermont Supreme Court to conclude that the state had abandoned its longstanding disapproval of same-sex relationships and therefore, that there existed no barrier to the extension of marriage benefits to same-sex couples.

The paper given by Kees Waaldjik, a professor who wrote the Netherland's same-sex-marriage bill, also demonstrates how incremental steps led to the Dutch same-sex marriage bill[8] and ultimately full mandated acceptance of homosexual relationships.

> Legislative recognition of homosexuality starts with decriminalization, followed or sometimes accompanied by the setting of an equal age of consent, after which anti-discrimination legislation can be introduced, before the process is finished with legislation recognizing same-sex partnership and parenting.
>
> The "law of standard sequences" implies . . . that . . . each step seems to operate as a stimulating factor for the next step. For example, once a legislature has enacted that it is wrong to treat someone differently because of his or her homosexual orientation, it becomes all the more suspect that the same legislature is preserving rules

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[8] *See* The "Law of Small Change": How the Road to Same-Sex Marriage Got Paved in the Netherlands by Kees Waaldjik (Faculty of Law, Universiteit Leiden, the Netherlands) 19 June 1999. Netherlands passed the bill in 2001.

of family law that do precisely that.

He then goes on to explain the "extremely gradual and almost perversely nuanced (but highly successful) process of legislative recognition of same sex partnership in the Netherlands."

> Since the 1970's and 1980's Dutch cohabiting couples have increasingly been given similar legal rights and duties as married couples. One after the other changes were introduced in rent law, in social security and income tax, in the rules on immigration, state pensions, and death duties, and in many other fields. And in none of these fields any distinction was made between heterosexual and homosexual cohabitation. There was never a 'law on same-sex cohabitation.' All recognition was given in the context of a more general overhaul of the rules of a specific field. Simultaneously cohabitation contracts and partner testaments became common, and were fully recognized by the courts. This evolution was more or less completed when it was made illegal for any employer and for any provider of goods or services, to distinguish between married and unmarried couples.
>
> * * *
>
> In the 1970's fostering became a possibility for gay and lesbian and other unmarried couples. Having a homosexual orientation

> or relationship stopped being a bar to keeping (access to) your children after a divorce. And the newer form of de facto parenting by same sex couples, artificial insemination by women in lesbian relationships was never banned in the Netherlands. . . . On 1 January 1998 legislation came into force making joint authority [over children] also available to same sex couples.
>
> * * *
>
> So what to mankind, and to all its representatives at this conference, may seem a giant step - the opening up of the institution of marriage to same-sex couples - will, for the Dutch, only be another small change.

Waaldjik's paper reveals that changes in the law tend to happen at a slow, incremental pace. This Court, therefore, must keep in mind that this case is not just about invalidating sodomy laws, it is about the goal of homosexuals to enter into the "clubhouse" of family and marriage as it currently exists so as to "radically alter" that institution. Signorile, *supra*, at 161. Recognition of a fundamental right to engage in private consensual sodomy is an incremental step toward disintegration of traditional family and marriage that should not be taken by this Court.

B.
Current Strategies to Redefine Sexuality and Marriage

1.
Our Youth

Recognizing that "[w]hoever captures the kids owns the future", Patricia Nell Warren, *Future Shock*, THE ADVOCATE 80 (Oct. 3, 1995), homosexual groups developed strategies to teach our youth that exploration of one's homosexual tendencies is healthy and normal. For example, Outright Vermont explains in a 2000 report (available at www.starsinc.org/outright.html) that its "target population" is youth between ages 14 & 22 and provides highlights of its *government-funded* activities held for public school students throughout the year, including (1) "Safer Sex Parties", the goal of which were to provide "[f]un exploration of sexuality & safer sex activities including demonstrations, guided practice & skill evaluation for barrier use"; (2) social events, where "[b]arriers & other safe sex supplies were available at the door & in the bathroom"; (3) "weekend retreats" where "[a]ll retreat participants practiced & were evaluated on their barrier use skills & were given a variety of barriers to take home; and (4) training in proper needle-cleaning techniques for those using hormones to alter gender characteristics.

GLSEN (Gay, Lesbian and Straight Education Network) has a guide designed to be used in public schools to eradicate institutionalized heterosexism. In determining whether institutional heterosexism exists, the authors ask such questions as: "Are gender-specific bathrooms and locker rooms the only option in your school?", "Do proms,

homecoming and athletic events have exclusive votes for 'kings' and 'queens'"? (available at www.glsen.org/templates/resources/record.html?section=18&record=1313).

PFLAG's (Parents, Families & Friends of Lesbians and Gays) brochure entitled "Be Yourself: Questions and Answers for Gay, Lesbian, Bisexual and Transgender Youth" (pflag.org/publications/BeYourself.pdf), contains recommended reading that encourages exploration of one's homosexual feelings at an early age. *See, e.g.*, Linnea Due, JOINING THE TRIBE: GROWING UP GAY & LESBIAN IN THE '90S 111 (1995) ("My first experience was with a much older man . . . . When I was fifteen, he must have been twenty-nine, thirty . . . I seduced him . . . It was a wild night"); Amy Sonnie, REVOLUTIONARY VOICES: A MULTICULTURAL QUEER YOUTH ANTHOLOGY 167 (2000) ("My sexuality is as fluid, infinite, undefinable, and ever-changing as the north-flowing river. . . . Sexuality is not black or white . . . it is gray . . . ."); Ann Heron, TWO TEENAGERS IN TWENTY: WRITINGS OF GAY AND LESBIAN YOUTH 134, 167, 171 (1995) ("I had been having sex with a man since I was fourteen"; "For gay liberation to have any value for youth, people must be reminded, preferably in fifth- or sixth-grade sex education classes, that gay is not only good, but probably a part of most sexual make-ups").

PLFAG also explains that "[b]eing GLBT [*i.e.* gay, lesbian, bisexual or transgender] is as much a human variation as being left-handed . . . . One or two sexual experiences with someone of the same sex may not mean you're gay . . . GLBT people have some sexual experiences with the opposite gender. . . . Your school years are a time of figuring out what works for you, and crushes and

experimentation are often part of that." "Be Yourself" at 4-5.

Not content with indoctrinating our youth with the message that homosexual conduct is as healthy and normal as heterosexual conduct, and that anyone who speaks out against homosexuality is "intolerant", *see* Stephen Daniels, *Intolerant Tolerance: The Weapon of Moral Relativism* 2 (available at www.ncfpc.org/policypapers.html), homosexual groups also are challenging traditional notions of family and morality through legislative and judicial attacks.

2.
The legislature and judiciary

The battlefield is ever growing. In most states, homosexuals are seeking rights previously not granted to them. They include the right to marry, the right to adopt, to abolish sodomy laws, to obtain for their partners' employee benefits provided to spouses of employees, to amend state and city discrimination laws to specifically prohibit discrimination based on a persons actual or *perceived* sexual orientation or gender identity and to add sexual orientation to Hate Crimes laws.[9] Transgendered persons are similarly

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[9] *E.g., Lewis et al. v. Harris et al.* (Sup. Ct. of N.J., Chanc. Div. Hudson Co.) (filed 2002) (7 couples seeking right to marry); *Lofton v. Kearney*, 157 F. Supp.2d 1372 (S.D. Fla. 2001) (seeking to invalidate Florida statute prohibiting adoption by same-sex couples); www.hrc.org/worknet/dp/index.asp & Glen E. Lavy, BEHIND THE RHETORIC: THE SOCIAL GOALS OF GLBT ADVOCACY IN CORPORATE AMERICA (www.corporateresourcecouncil.org)

seeking nondiscrimination laws, including the right to use restrooms that correspond to the gender they perceive themselves to be, not according to their actual gender.[10] Some cities have passed, or are attempting to pass statutes that require all entities contracting with the city to provide benefits to partners of same-sex employees on the same basis as they provide them to spouses of employees, irrespective of any religious objections to providing such benefits.[11] A ruling in this case that overturns *Bowers* and finds that there is a fundamental right to engage in private consensual sexual conduct will be used as a sword in these ongoing, and in the future, legislative and judicial battles.

3.
Sexual preference is a non-existent class

A ruling that the state must have a compelling

(each discussing the efforts to gain employee benefits); www.hrc.org/newsreleases/2003/030205hatecrimes.asp (Cincinnati adds sexual orientation to hate crimes law, despite FBI crime statistics showing bias crimes as a result of race and religion far exceed those based on sexual orientation, www.fbi.gov/ucr/ucr.htm).

[10] *See* www.ntac.org/pr/release.asp?did=21 (restrooms); www.hrc.org/issues/transgender/010327highlights.asp (recent transgendered efforts by HRC); www.ci.boulder.co.us/cao/brc/121.html (Boulder ordinance prohibiting employment discrimination based on actual or perceived gender identity).

[11] *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (ordinance upheld); www.council.nyc.us/textiles/Int%2002722002.htm (NYC bill introduced).

interest to justify the disparate treatment of homosexual and heterosexual sexual conduct will not only undermine a state's right to proscribe conduct that erodes the institution of traditional marriage, but also is particularly inappropriate where, as here, there is a growing body of academic literature explaining that one's sexual orientation is fluid and ever-changing. *See, e.g.*, Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L. J. 98-109 (1995) (sexual orientation is "not fixed, but change[s] over time"; categories of heterosexual and homosexual "are rhetorical. . . because of a disjuncture between the concepts of homosexual and heterosexual and the sexual acts they claim to signify"); Andrew Sullivan, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 151-54 (1995) (for purposes of discrimination laws, race is different than sexual orientation because sexual orientation can be hidden and is a complex "mixture of identity and behavior").

The growing frequency at which lesbians are entering into relationships with men confirms this fluidity. The "phenomenom" is becoming so commonplace that the term "hasbian" – "a woman who used to date women but now dates men" – has been introduced into the homosexual community. Amy Sohn, "Bi for Now", NewYork Metro.com. Widely-known examples include Anne Heche (movie actress) ending her relationship with Ellen DeGeneres to marry a man. Sinead O'Connor (Irish singer) declaring herself a lesbian, yet in 2001 marrying a man. Julie Cypher (partner of Melissa Etheridge) left their relationship by declaring that she was never a lesbian. A 2000 survey in Australia similarly found that 19 percent of

gay men reported having sex with a woman in the six months prior to the survey. Julie Robotham, *Safe Sex by Arrangement as Gay Men Reject Condoms*, THE SYDNEY MORNING HERALD (June 7, 2001).

There also is no scientific evidence that homosexuality is genetic, and therefore, immutable. *See* Michael Bronski, *Blinded by Science*, THE ADVOCATE, Feb. 1, 2000, 64 (Dr. Edward Stein explains that "there are serious problems with the science" claiming a biological origin to homosexuality). Significantly, Dr. Robert Spitzer, one of the men who helped change the American Psychiatric Association's opinion on treating homosexuality as a mental disorder, recently acknowledged that homosexuals can become heterosexual. Pete Winn, *A Crack in the Wall? A Respected Psychiatrist Rethinks Homosexuality*, CITIZENLINK: FAMILY ISSUES IN POLICY AND CULTURE (Feb. 21, 2000) ("I'm personally convinced that many of these individuals have maintained and made major changes in their sexual orientation") (available at www.family.org/cforum/hotissues/a0009548.html); Dr. Warren Throckmorton, *Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays*, PROFESSIONAL PSYCHOLOGY, RESEARCH AND PRACTICE (June 2002) ("sexual orientation, once thought to be an unchanging sexual trait, is actually quite flexible for many people, changing as a result of therapy for some, ministry for others and spontaneously for still others").

Fluidity of one's sexual orientation, and the lack of any evidence establishing its immutability, precludes defining a class based on sexual preference.

IV.
CONCLUSION

For the foregoing reasons, the decision of the Texas Court of Appeals for the Fourteenth District should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

versus

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas
Fourteenth Division

BRIEF OF AMICUS CURIAE FIRST PRINCIPLES, INC. in support of the Respondent

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INTEREST OF THE AMICUS

This Brief is filed with consent pursuant to S. Ct. Rule 37 and Fed. R. App. P. 29(a). Amicus files this Brief in support of the Respondent, State of Texas, and urges the Court to uphold the decision of the lower court in *Lawrence v. Texas,* 41 S.W.3d 349 (Tex. App. 2001), which holds that the Texas Penal Code Ann. §§ 21.06 (Vernon 1994) did not offend the Texas state or federal constitutions. First Principles, Inc., is a public educational foundation organized and existing as a non-profit corporation under the laws of the Commonwealth of Kentucky. First Principles is concerned about educating, preserving and defending the history and foundations of American law and civil government, our first principles which are increasingly under attack in the courts and other public institutions. As Justice Oliver Wendell Holmes, Jr., said, "A page of history is worth a volume of logic." (See *New York Trust Co.* v. *Eisener*, 256 U.S. 345 (1921).) The suppression, rewriting, and even censorship of American history effects many legal and public issues, and in litigation, as in war, truth is ofen the first casualty.

STATEMENT OF LEAVE TO FILE BRIEF AMICUS CURIAE FIRST PRINCIPLES, INC. in support of the Respondent

The Respondent has confirmed consent to the filing of this brief amicus curiae.

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Warren Weaver, Desk Diary, May 7, 1951, pp. 4-5, Rockefeller Archive Center. 13, 14
NOAH WEBSTER, THE AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) 28
Herbert Wechsler, *Challenge of a Model Penal Code* 63 HARVARD LAW REVIEW (1952) 4, 8, 19
Paul E. Wilson, *New Bottles for Old Wine: Criminal Law Revision in Kansas*, 16 KANSAS LAW REVIEW (1968) 26

REASONS FOR AFFIRMING THE DECISION OF THE COURT OF APPEALS OF TEXAS BELOW

I. The Texas Sodomy Statute in Question Was Fashioned upon the ALI Model Penal Code.

The first sodomy law was enacted in Texas on February 1, 1860, using the common law definition of a crime against nature with a penalty of 5-15 years in prison. American Common Law was primarily based on Blackstone's Commentaries on the Laws of England 1765. In Volume IV, pp. 215-216, sodomy is described:

> The infamous crime against nature, committed either with man or with beast...the very mention of which is a disgrace to human nature. [Our English law] treats it, in its very indictments, as a crime not fit to be named. This the voice of nature and of reason, and the express law of God, determine to be capital...But now the general punishment of all felonies is the same, namely, by hanging.

Texas courts interpreted this definition to exclude oral sex,[1] and to include both homosexual and heterosexual deviate acts.[2] In 1943, the statute was amended to include fellatio as sodomy, passing unanimously in the House and Senate, 127-0 and 24-0. The law proscribed copulation with animals as well:

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being for the purpose of having carnal copulation...shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and

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[1] *Prindle* v. *State*, 21 S.W. 360 (Tex. 1893). "[However] vile and detestable the act proved may be, and is, it can constitute no offense, because not contemplated by the statute, and is not embraced in the crime of sodomy."

[2] *Lewis v. State*, 35 S.W. 372 (Tex. 1896). See also, *Adams* v. *State*, 86 S.W. 334 (Tex. 1905).

shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Laws of Texas, 1943, at 194, chapter 111, enacted April 8, 1943.

In 1971, a Texas federal court rejected a married couple's request for injunction to prohibit enforcement of the sodomy law against married couples. The court noted that no married couples had ever been prosecuted under the law and future prosecution of them was unlikely. The court found sodomy to be a "heinous" crime laws against which the federal courts should respect.

Dawson v. Vance, 329 F. Supp. 1320 (D. Tex. 1971).

In 1973, Texas followed the lead of other states in enacting a comprehensive criminal code revision based on the American Law Institute's Model Penal Code. The Texas Law Review reported a grand jury's statement that: "The Penal Code of Texas, as it now exists...is a hodgepodge of inconsistencies, inequities, and penalties which have no basis in reason or common sense."[3]

Why would Texas consider the laws which had served its citizens for a century so inept? The revision committee reports,

> The State Bar committee was encouraged in its decision to revise the [Texas] penal code by three factors which indicate the timeliness of the project. First, the American Law Institute's Model Penal Code is available as a guide for the study; secondly, a great number of other states have recently taken action to bring their penal codes up to date, and finally our own state legislature has launched a general statutory revision program...the outstanding virtue of the Model Penal

[3] W. Page Keeton and William G. Reid. *Proposed Revision of the Texas Penal Code*, 45 TEXAS LAW REVIEW, 402 (1967).

> Code is that it offers a draft conceived and reviewed by experts...[4]

II. The American Law Institute's Model Penal Code (ALI) and Its Reliance Upon the Debunked and Discredited Kinsey Reports Is Central to an Under-standing and Proper Decision of This Case.

Basic to an understanding of the radical change which Petitioners seek to effect in a Texas sodomy statute is the fact that the elimination of sodomy statutes, accomplished in a majority of states and advocated herein by the Petitioners, represents an abandonment of the American common law and our unique system of Federalism based on an unreliable authority. On page 6 of their Petition for Writ of Certiorari, Petitioners state:

> The Homosexual Conduct Law was substituted [in 1974] for a facially nondiscriminatory law at a time when many States, prompted by changing views about the proper limits of government power that were reflected in the American Law Institute's Model Penal Code, were revising their criminal codes and completely abandoning offenses like fornication and sodomy. See Model Penal Code and Commentaries § § 213.2 cmt. 2, 213.6 note (1980). By 1986, 26 States had invalidated their sodomy laws. Bowers, 478 U.S. at 193-94.

This brief will demonstrate the ALI Model Penal Code (MPC) Reporters extensively used what is now known to be fraudulent and criminally-derived scientific authority. The ALI's MPC Draft recommended decriminalizing acts of sodomy based upon the unreliable Kinsey Reports. The ALI Reporters adopted "changing views" based on The Kinsey Reports with the "Kinsey Scale" of a fluctuating human sexuality. Long-settled American common penal laws like those proscribing "fornication and sodomy," meant

[4] Keeton and Reid, *supra.*, at 404.

to protect society's smallest building block, marriage, were, according to Chief ALI Reporter Herbert Weschler, "ineffective, inhumane and thoroughly unscientific," based on the truth now available through "objective scientific pursuit."[5]

Kentucky's experience is illustrative of the way other sodomy statutes have been improperly overturned, and bears strong resemblance to this case. When the Kentucky General Assembly was recognized as unlikely to repeal the sodomy statute, K.R.S. 510.100, in the foreseeable future, advocates of change undertook the defense of a criminal prosecution which had been brought under the sodomy statute in Fayette District Court. At trial, the advocates offered the testimony of six expert witnesses, including an anthropologist, a minister, a psychologist, a medical doctor, and a co-author of the Kinsey Reports, and filed briefs submitted by 26 amici curiae.

Commonwealth v. *Wasson*, Ky., 842 S. W. 2D 487, 489-90 at N. 1 (1992).

The prosecution, by contrast, "presented no witnesses," and offered "no scientific evidence or social science data." 842 S. W. 2d at 490.[6]

Not surprisingly, upon such a record, the trial court found the statute unconstitutional, and the Fayette Circuit Court affirmed that decision. 842 S.W. 2d at 488-489.

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[5] Weschler, H., *Challenge of a Model Penal Code*, 65 HARVARD LAW REVIEW, 1103 (1952).

[6] However, "Fayette District Judge Lewis Paisley refused to allow the county attorney to introduce any treatises on the subject of sodomy. A motion for separation of the defense witnesses was also denied." Moreover, "[Fayette Circuit] Judge Tackett expressed the opinion that the sexual acts performed by consenting adult homosexuals are necessary for them to enjoy a full and satisfying sexual life." *Wasson*, 842 S.W. 2d at 510 (Wintersheimer, J., dissenting).

The Kentucky Supreme Court then accepted the case upon a direct submission bypassing the Kentucky Court of Appeals. 842 S. W. 2d at 489. A sharply divided Kentucky supreme Court affirmed by a 4-3 vote and invalidated the state's sodomy statute, over two strong dissenting opinions. In its opinion, the majority noted that Kentucky thus joined "the moving stream" of "change," doing so "in deference to the position taken by the American Law Institute in the Model Penal Code." 842 S.W. 2d at 497-98. Thus the Wasson decision as in this case also relied upon the Kinsey Reports via testimony from its co-author, and upon the ALI Model Penal Code.

III. America's Law Order Changed From the Fixed Principles of the Declaration of Independence "Endowed by Their Creator" to Man-centered "Changing Views" Based on Evolving Law and Evolutionary "Science-based Legal Reform."

"A page of history is worth a volume of logic."

JUSTICE OLIVER WENDELL HOLMES, JR., *New York Trust Co.* v. *Eisener*, 256 U.S. 345, 349 (1921).

From the birth of our Republic, "One Nation Under God," American common law rested on the foundation of five centuries of English common law, particularly as set out in the Commentaries of Sir William Blackstone, whose legal foundation was declared to be:

> the Law of Nature and the Law of Revelation [upon which] depend all human laws; that is to say, no human laws should be suffered to contradict these.

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 1, at 42 (1769).

Since 1793, the U.S. supreme Court has referred to Sir William Blackstone's Commentaries more than 272 times, in 200 years, for direction in the law. There were 57 such references between 1990 and 1996.

Following Blackstone, America's Declaration of Independence, the Charter of law, justice, and civil government, was thus based upon "the Laws of Nature and of Nature's God."[7] American Colonies and then State penal codes also adopted much of the English common law and prohibited "Offenses against Persons" and "Crimes against Morals." American Law was fixed on "truths" which are "self-evident" which guaranteed certain "unalienable Rights, ... Life, Liberty, and the Pursuit of Happiness" which are endowed from "their Creator."

These fixed principles from our founding Charter, upon which the U.S. Constitution is based, are capable of being understood by *We the People* with resort to original meaning—"the canon that a document is to be construed to accomplish the draftsmen's intention"—a process of legal interpretation that reaches back to English law of the thirteenth century.

Chief Justice John Marshall wrote that he could cite from the common law "the most complete evidence that the [drafters' original] intention is the most sacred rule of interpretation," which is self-evident truth. "The meaning attached by the writer to his words is the essence of communication." [Emphasis supplied.][8]

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[7] The Declaration of Independence is the first ordinance in the first volume of The Public Statutes at Large of the United States of America, printed in 1845 by the authority of the United States Congress. Stat. 1-3 (1845). See also, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, 69th Congress, 1st Session, House Document No. 398 (1927).

[8] Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 INDIANA LAW JOURNAL (1997). Online version at www.law.indiana.edu/ilj/v72/no3/berger.html

IV. Fixed American Penal Law Is Supplanted by "Science-based Law Reform."

[L]aw cases can turn almost entirely on an understanding of the underlying technical or scientific subject matter.[9]

In 1870, following the publication of Charles Darwin's *"The Origin of Species,"* Christopher Columbus Langdell of Harvard University and that institution's president, Charles William Elliott, led a movement to infuse Darwinian principles into law and education. Langdell and Elliott held that since mankind and nature are not creations of a "Supreme Being," but rather are continuously evolving, the law must do likewise.[10]

1890 distinguished Harvard Law graduate (1877) and Boston attorney Louis D. Brandeis, assisted in founding the Harvard Law Review and co-authored *The Right to Privacy*,[11] the most influential such article in American legal history. "Privacy," a highly controversial legal innovation described "a common-law right to be let alone that had not expressly been recognized by any English or American court,"[12] which innovation is implicit throughout the ALI's Model Penal Code in regard to "Sex Offenses." In the 1950s, David Allyn reports, the ALI "attempted to shape its Model Penal Code in accordance with Kinsey's scientific

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[9] Stephen Breyer, Associate Justice U.S. supreme Court, *The Interdependence of Science and Law*, SCIENCE MAGAZINE, 280; 537-538 (April 24, 1998).

[10] Herbert W. Titus, GOD, MAN AND LAWS: THE BIBLICAL PRINCIPLES, at 130 (1994).

[11] Samuel Warren and Louis Brandeis, *The Right to Privacy*, HARVARD LAW REVIEW (1890).

[12] Robert C. Berring, GREAT AMERICAN LAW REVIEWS, Edited with Commentary, p. 16 (1984); Morris L. Ernst and Alan U. Schwartz, PRIVACY, THE RIGHT TO BE LET ALONE, (1962).

discoveries – by privatizing most moral questions."[16] As Brandeis' 1890 Harvard Law Review began to simply "define anew" common law protections for the person and property, similarly Professor Weschler's 1952 Harvard Law Review reports on the ALI's attempt to merely "define and clarify" the common law principles that exist in our country."[17]

Louis B. Schwartz, ALI Reporter responsible for drafting the "Sex Offenses" section of the Model Penal Code; sought to distinguish between "private" and "public" sexual behavior. Though "slippery," he "felt that any behavior which might somehow be classified as private could be successfully deregulated." Schwartz summed up the ALI's "privacy" innovation in "Sex Offense" law by saying; "Contrary to existing law . . . any behavior participated in by small groups of consenting adults should be legal."[18]

Kinsey's omission of the negative social impact of sexual acts, while claiming grave social disorder due to traditional rules of monogamy and chastity, played a critical role in the mid-century privatization of morality. By 1996, Professor David Allyn of Princeton University explained in detail what escaped most judges and lawyers trained since 1960,

> Sexual Behavior in the Human Male undermined the assumptions of the dominant moral economy in two ways. First it drew a sharp opposition between science and sexual morality, between realism and idealism. Kinsey made it clearer that many American moral

[16] David Allyn, *Private Acts/Public Policy: Alfred C. Kinsey, the American Law Institute and the Privatization of American Sexual Morality*, JOURNAL OF AMERICAN STUDIES, AT 407 (1996).

[17] Robert Rothenberg, THE PLAIN-LANGUAGE LAW DICTIONARY, p. 19 (1981).

[18] David Allyn, *supra*, p. 424.

values were grounded in false assumptions about human behavior. Because American private behavior did not conform to public expectations, Kinsey suggested that such expectations were therefore unrealistic. Second, I would argue, Kinsey's text aided the privatization of morality in a more subtle manner by down-playing the problem of public sexual expression. The text gave the impression that sexual behavior only occurred in the private space of the home. Sexual Behavior in the Human Male was virtually silent when it came to questions of public sexuality; this silence served Kinsey's deregulatory ends ... This rhetorical opposition allowed the Supreme Court to produce two seemingly contradictory lines of argument in *Roth v. The United States* (1957) and *Griswold* v. *Connecticut* (1965). The first upheld the criminality of pornography while the second established the sexual rights of married couples. Both cases drew on the American Law Institute's model penal code's distinction between public and private sexual expression, which, in turn, drew on the work of Alfred Kinsey.[19]

In 1923, two generations after evolution took root in American law at Harvard, the American Law Institute, in 1923, began a study of the assumed "defects" in American criminal law. The ALI's Model Penal Code project, first advanced in 1931 by the Joint Committee on Improvement of Criminal Justice, composed of representatives of the American Bar Association, the American Law School Association, and the American Law Institute; see, ABA Rep. 25, 494, 513 (1931) was a private study without state or federal legislative authorization. The ALI Model Penal Code project received encouragement from President Franklin Delano Roosevelt and funding from the Rockefeller Foundation in 1950.[20]

[19] David Allyn, *supra*, p. 407.

[20] Letter of President Roosevelt included in *Report of the Advisory Committee on Criminal Justice to the Council of the American Law Institute* dated January 30, 1935, 373-375, American Law Institute Archives, Philadelphia.

Psychiatrist and ALI advisor Manfred Guttmacher explained the 25-year delay from 1923 in the criminal code revision:

> In 1950 the American Law Institute began the monumental task of writing a Model Penal Code. I am told that a quarter of a century earlier the Institute had approached the Rockefeller Foundation for the funds needed to carry out this project, but at that time, Dr. Alan Gregg, a man of great wisdom counseled the Foundation to wait, that the behavioral sciences were on the threshold of development to the point at which they could be of great assistance. Apparently, the Institute concluded that the time had arrived.

Manfred Guttmacher, M.D., THE ROLE OF PSYCHIATRY IN LAW, INTRODUCTION, pp. v, vi (1968).

By the 1970s the ALI's MPC was being widely referred to and taught from the Appendix in Criminal Law textbooks in law schools throughout America as having **"abolished common law crimes."**

> In 1962 the American Law Institute adopted the Model Penal Code, portions of which appear as an Appendix to this [criminal law text] Book...The Code has had a very significant impact. In recent years 36 states have enacted comprehensive new criminal codes, 5 others have completed work on but have not enacted new codes, and another 2 have revisions under way. These [state criminal] codes draw heavily upon the Model Penal Code, and most of them have followed its lead in abolishing common law crimes.[21]

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[21] Wayne R. Lafave, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS, at 46-47 (2nd Edition, 1988).

V. The ALI Model Penal Code Is an Unreliable Authority Upon Which to Decide This Case Because of the Code's Reliance Upon the Fraudulent and Criminally Derived Kinsey Reports.

The respected medical journal, *The Lancet,* reviewed Dr. Reisman's first book, *Kinsey, Sex and Fraud* (1990) recognizing:

> Dr. Judith A. Reisman and her colleagues demolish the foundations of the two reports...The important allegations from the scientific viewpoint are imperfections in the sample and unethical, possibly criminal, observations on children...The book goes beyond that, however, for Kinsey, *et. al,* questioned an unrepresentative proportion of prison inmates and sex offenders in a survey of "normal" sexual behaviour...Kinsey, an otherwise harmless student of the gall wasp, has left his former co-workers some explaining to do.[22]

Dr. Judith Reisman's research into the "scientific" basis for the ALI's MPC "Sex Offenses" section, and the Kinsey Reports, has dispositively revealed, from the Kinsey authors themselves, the data are fatally flawed.[23]

For 50 years the exalted validity of the Kinsey studies derived primarily from the large sample claimed, possibly 18,000 subjects; however, Kinsey "used only a quarter of the cases in his two reports, without notice."[24]

It will be shown there are many official published admissions and acknowledgments of zoologist Alfred Kinsey and his co-authors that their sex "science" is an unreliable

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[22] "Really Dr. Kinsey?," 337 THE LANCET 547 (March 2, 1991).

[23] J. A. Reisman, KINSEY: CRIMES AND CONSEQUENCES, (2000).

[24] J. A. Reisman, KINSEY: CRIMES AND CONSEQUENCES, 50-53, (2nd ed., 2000). See also Arno Karlen, SEXUALITY AND HOMOSEXUALITY, 456 (1971).

authority for any change in law or public policy. In fact, Kinsey's "methodology" for changing society's sexual life was modeled after gall wasp studies. Kinsey said "The techniques of this research [were] born out of the senior author's longtime experience with a problem in insect taxonomy. The transfer from insect [gall wasps] to human material is not illogical," and could be applied to any population (*Male* volume, p. 9). Co-author and former Kinsey Institute Director Paul Gebhard reported:

> In the early stages of the research, when much interviewing was being done at Indiana correctional institutions, Dr. Kinsey did not view the inmates as a discrete group that should be differentiated from people outside; instead, he looked upon the institutions as reservoirs of potential interviewees, literally captive subjects. This viewpoint resulted in there being no differentiation in our 1948 volume between persons with and without prison experience. . Kinsey never [kept] a record of refusal rates—the proportion of those who were asked for in interview but who refused.[25]

Kinsey Hagiographer Johnathan Gathorne-Hardy, revealed that Kinsey never hired a statistician. "Frank Edmondson, young astronomer" who had had "some rather superficial statistical training" was Kinsey's fake statistician. Clyde Martin "was no scholar" and had no such knowledge. Said Edmondson, Kinsey "wasn't a mathematician," in fact Kinsey "often got muddled between mean (average) and median," elementary statistical concepts.[26]

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[25] Gebhard, Gagnon, Pomeroy, and Christenson, SEX OFFENDERS, 31-33 (1965)(emphasis supplied).

[26] Johnathan Gathorne-Hardy, ALFRED C. KINSEY: SEX THE MEASURE OF ALL THINGS, p. 97, 98, 144 (1998).

Yet the Kinsey team regularly wrote and testified to the "normal" or "average" nature of their male sample. Within months after the Male Volume was published, Dr. Kinsey was invited to testify before a judicial committee of the California Legislature, regarding sex offense law. First, he claimed that his decade of research reflected "normal sexuality" to be found in the entire American male population; "[Our research] has the advantage of having a background of the picture typical in the population as a whole..."[27]

Paul Gebhard undertook to "clean up" the data after Kinsey's death and in 1979, when most state penal code revisions, including Texas', were concluding, revealed that of the 18,000 interviews, 5,300 White Males accounted for the research base in the Male Volume. Of that 5,300, 2,446 were designated as convicts, 1,003 homosexuals, 50 transvestite, 117 mentally ill, 342 "Other," 650 boys* (KKC, p. 99), yielding 4,628 n= Aberrant and 873 n="Normal."[28]

Dr. Alan Gregg, director of the Medical Science Division of the Rockefeller Foundation, funded Kinsey's research and Warren Weaver recorded Gregg's concerns regarding serious flaws in Kinsey's data on May 7, 1951:

> [T]here has never been, in this group, any trained mathematical statistician who comes within gunshot of having the competence, training, and experience which are required. In Dr. Kinsey's own listing of his staff (Progress Report, April 1, 1950) he says that Mr. Clyde E. Martin 'continues in charge of the statistical

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[27] Testimony of Alfred C. Kinsey before the Assembly Interim Committee on Judicial System and Judicial Process of the California Legislature, 1949, p. 133. Recorded in the Assembly Journal, March 8, 1950.

[28] NIMH Grant The Kinsey Data; Marginal Tabulations, 1979, p. 3.-6 Gebhard and Johnson claim theirs is a 5,460 White Male Sample.

handling our data (sic).' His scientific stature has not as yet caused him even to be listed in American Men of Science, the latest edition of which contains about 50,000 names. Dr. Kinsey must approve highly of him, for in 1951, he raised his salary by 36 per cent. In his own diary record of a visit to Kinsey in July 1950, Dr. Gregg said, under the heading of personnel: 'Past and present needs remain unsatisfied in point of . . . statistics." This fault — this admittedly absolutely basic fault — existed in the project in 1942, it has existed ever since, there is no promise whatsoever that it will cease to exist — and we do nothing about it.[29]

Moreover, Kinsey failed to allow for "volunteer error." As Dr. Abraham Maslow has noted:

> [V]olunteers will always have a preponderance of [aggressive] high dominance people and therefore will show a falsely high percentage of non-virginity, masturbation, promiscuity, homosexuality, etc. in the population.[30]

Finally, zoologist Alfred C. Kinsey was not the conventional, middle-American family man, who was merely a "disinterested" academic Indiana University, and the mass media presented him to be. In 1997, Kinsey biographer James H. Jones, reveals,

> The man I came to know bore no resemblance to the canonical Kinsey. Anything but disinterested, he approached his work with missionary fervor...He wanted to undermine traditional morality, to soften the rules of restraint...Kinsey was a crypto-reformer who spent

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[29] Warren Weaver, Desk Diary, May 7, 1951, pp. 4-5, Rockefeller Archive Center.

[30] Abraham Maslow, *Test for Dominance-Feeling (Self-Esteem) in college Women*, THE JOURNAL OF SOCIAL PSYCHOLOGY 255, 270 (1940); Abraham Maslow, *Self-esteem, Dominance, Feeling and Sexuality in Women*, 16 THE JOURNAL OF SOCIAL PSYCHOLOGY 259, 294 (1942)

> his every waking hour attempting to change the sexual mores and sex offender laws of the United States...In Kinsey's case, the personal was always political.[24]

Later Jones commented on how Kinsey's own carefully manufactured persona hid his "missionary fervor...to undermine traditional morality" and his own sexual predilections which would have damaged his credibility and stopped his mission to change the sex offender laws of the United States:

> There is no way that the American public in the 1940s and the 1950s would have sanctioned any form of behavior that violated middle class morality on the part of the scientist who was telling the public that he was disinterested and giving them the simple truth....Any disclosure of any feature of this private life that violated middle class morality would have been catastrophic for his career....For Kinsey, life in the closet came complete with a wife, children, a public image... that again he preserved at all costs. Kinsey's reputation still in large measure rests upon an image of him that he cultivated during his lifetime...the official mystique.[25]

It was safer to reveal in 1997 that Kinsey was a sado-masochistic homosexual, than in 1950 before many sodomy laws changed via The Kinsey Reports and the ALI MPC. Sexual harassment was rampant in his team and his relationship with "statistician" Clyde Martin may explain why Kinsey allowed the Reports statistics to suffer:

> The power relationship between Kinsey and then unmarried Martin . . . was not exactly equal. Kinsey

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[24] James H. Jones. *"Dr. Yes,"* THE NEW YORKER, September 1, 1997, p. 100-101.

[25] James H. Jones, interview in Tim Tate, Secret Histories: Kinsey's Paedophiles. (Yorkshire Television (Channel 4), United Kingdom, aired August 10, 1998.

was older, well established professionally, and Martin's employer. Kinsey worked hard at seducing this insecure, anxious, and financially strapped young man.[31]

Finally Jones reports that, "Kinsey concentrated on negative eugenics, calling for a program of sterilization that was at once sweeping and terrifying. "The reduction of the birth rate of the lowest classes must depend upon the sterilization of perhaps a tenth of our population."[32]

While Gore Vidal pronounced Kinsey the "most famous man in the world for a decade" the Channel 4, British Yorkshire Television documentary, "Kinsey's Paedophiles," also confirmed Dr. Judith Reisman's findings including how Kinsey's team collaborated with active pedophiles and the resulting criminally derived pedophile "data," became "Table 34," on page 180 in *Sexual Behavior in the Human Male*. Kinsey-favoring biographer James Jones admitted in the British Yorkshire interview what was printed in Kinsey's own seminal research that children some as young as 2 months of age were used by "9" adult male subjects for Kinsey's human experiments:

> Kinsey relied upon [King, a pedophile] for the chapter on childhood sexuality in the male volume . . . Many of his victims were infants and Kinsey in that chapter himself gives pretty graphic descriptions of their response to what he calls sexual stimulation. If you read those words, what he's talking about is kids who are screaming. Kids who are protesting in every way they can the fact that their bodies or their persons are being violated.[33]

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[31] James H. Jones, ALFRED C. KINSEY: A PRIVATE/PUBLIC LIFE, p. 393.

[32] *Id.*, at 809, FN 78 (1997).

[33] "Secret Histories, *Kinsey Paedophiles*, *supra*. See also *Kinsey, infra*, at 161 (noting "violent convulsions, groaning, sobbing, violent cries, with an abundance of tears (especially among younger children.")).

In addition to King's data, until the Yorkshire investigators located the criminal trial records and news reports in Berlin, only a few in Kinsey's inner circle knew about the Kinsey Institute's long-standing collaboration with Dr. Fritz Von Balluseck, the Nazi pedophile, who contributed his child abuse data (from roughly 1936-1956) to Kinsey's research database.[34] A sampling of German newspaper accounts tell the story:

> The Nazis knew and gave him the opportunity to practice his abnormal tendencies in occupied Poland on Polish children, who had to choose between Balluseck and the gas ovens. After the war, the children were dead, but Balluseck lived.

[*National-Zeitung*, May 15, 1957].

> Balluseck . . . corresponded with the American Kinsey Institute for some time, and had also got books from them which dealt with child sexuality. [*Tagespiegel*, October 1, 1957].

> The connection with Kinsey, towards whom he'd showed off his crimes, had a disastrous effect on [von Balluseck]...[I]n his diaries he'd stuck in the letters from the sex researcher, Kinsey in which he'd been encouraged to continue his research . . . . He had also started relationships ... to expand his researches. One shivers to think of the lengths he went to. [*TSP*, May 17, 1957, emphasis added]

Kinsey recorded these horrific events in his *Male* volume cloaked in scientific respectability:

> Better data on preadolescent climax come from the histories of adult males who have had sexual contacts with younger boys and who, with their adult backgrounds, are able to recognize and interpret the boys'

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[34] J. A. REISMAN, *supra.*, pp. 165-170.

> experiences . . . 9 of our adult male subjects have observed such orgasm. . .we have secured information on 317 preadolescents who were either observed in self masturbation, or who were observed in contacts with other boys or other adults.[35]

VI. The Kinsey Reports' Junk Sex Science Is Authority for "Science-based" Legal Reform and the Primary Authority for Decriminalizing Sodomy Laws.

Kinsey's Sexual Behavior in the Human Male appeared in January, 1948 and Sexual Behavior in the Human Female followed in August, 1953 each with extraordinary media coverage. The American Law Institute adopted The Kinsey Reports' findings, which included the conclusion that 95% of "normal" American men, many veterans of "the greatest generation," would be classified as sex offenders under the common law code in 1948.[36] The American Law Institute concluded these state sodomy laws were unenforceable and should be modified to take into account man's sexual evolution. "Regarding homosexuality, [ALI Reporter] Schwartz cited the Kinsey Reports as evidence of the frequency of homosexual activity and the senselessness of trying to control it."[37] Indeed, upon the Kinsey "research" many state sodomy laws have been changed or overturned.[38]

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[35] Alfred C. Kinsey, Wardell Pomeroy, Clyde Martin, SEXUAL BEHAVIOR IN THE HUMAN MALE, p. 144 (1948).

[36] "This is one of the startling observations of the Kinsey group ... When a total clean-up of sex offenders is demanded, it is in effect a proposal to put 95% of the male population in jail." Deutsch, Sex Habits of American Men, p. 121.

[37] David Allyn, *supra*. 426 (1996).

[38] Richard Green, SEXUAL SCIENCE AND THE LAW, pp. 1, 5 (1992).

A. The Call for "Science-based" Legal Reform

A 1952 article in the Harvard Law Review by ALI's Chief Reporter Herbert Weschler advocated for revision of; "ineffective, inhumane and thoroughly unscientific" state criminal laws which, its author claimed, were not based on the truth which had now become available through "objective" scientific pursuit.[39] Attorney Morris Ernst, a few months after the appearance of the 1948 Kinsey Report, published one of five books which would be published advocating penal reform based on the "science" of the Kinsey Reports, stating:

> [V]irtually every page of the Kinsey Report touches on some section of the legal code . . . a reminder that the law, like our social pattern, falls lamentably short of being based on a knowledge of facts.[40]

Based upon Kinsey's biased and seriously flawed data, the "Sexual Offenses" Art. 207, of the Model Penal Code was constructed. ALI Reporter Morris Ploscowe parroted Kinsey's "scientific" findings:

> These pre-marital, extra-marital, homosexual and animal contacts, we are told, are eventually indulged in by 95 per cent of the population in violation of statutory prohibitions. If these conclusions are correct, then it is obvious that our sex crime legislation is completely out of touch with the realities of individual living and is just as inherently unenforceable as legislation which prohibits . . . an activity which responds to a wide human need.[41]

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[39] Weschler, H., *Challenge of a Model Penal Code*, 65 HARVARD LAW REVIEW 1103 (1952) .

[40] Morris Ernst and David Loth, AMERICAN SEXUAL BEHAVIOR AND THE KINSEY REPORT, n. 28, 132 (1948).

[41] Morris Ploscowe, *Sexual Patterns and the Law*, in Albert Deutsch, SEX HABITS OF AMERICAN MEN: A SYMPOSIUM ON THE KINSEY REPORT, 126 (1948).

In addition to this book by Albert Deutsch (Ed.), to which Ploscowe contributed, three of the four others calling for "science-based" law reform based on the new "science" of the Kinsey Reports, were collections of essays of luminaries in education, law, psychiatry, psychology, and medicine.[42]

B. Changing Standards Changes terms:

Section 207 of the ALI Model Penal Code, abandoned discrete common law terms in favor of new scientific terms: "Sexual Offenses," first appeared in 1955, Draft 4.

Section 207.5, titled "Sodomy and Related Offenses," proposed that consensual sodomy with an "actor" 10 years or older be classified a misdemeanor. Appendix A to section 207.5 is titled Frequency of Sexual Deviation, and consists of 21 quotations, 19 of which are taken from Kinsey's book, Sexual Behavior in the Human Male (1948). The ALI Model Penal Code Reporters quote Kinsey's findings that 72% of males experiment with mouth-genital contact, 40 to 50% of farm boys have animal contact, "37% of the total male population has at least some overt homosexual experience to the point of orgasm between adolescence and old age. This accounts for nearly 2 males out of every 5 that one may meet."[43]

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[42] Rene Guyon, THE ETHICS OF SEXUAL ACTS (1948); Morris Ernst, AMERICAN SEXUAL BEHAVIOR AND THE KINSEY REPORT, (1948); Donald Porter Geddes and Enid Curie, EDS., ABOUT THE KINSEY REPORT (1948); Jerome Himelhoch and Sylvia Fava, EDS., SEXUAL BEHAVIOR IN AMERICAN SOCIETY (1948).

[43] Model Penal Code, Draft 4, Section 207.5 (1955) *Sodomy and Related Offenses,* appendix A, pp. 281-282. Quoting from Kinsey's *Male* volume, pp. 371, 671, Figure 156 [page 625].

C. Kinsey's data "permeate all present thinking on this subject."[44]

Although the authors of the ALI MPC accepted Kinsey's conclusions at face value, Kinsey's data are more than fatally flawed, and are not even scientific as the sample was, according to Kinsey's coauthors, never representative of the American adult male population.

The ALI began a campaign to secure enactment of its provisions as state law beginning in Illinois which adopted the Code in 1961. Frank Horack, Jr., acting Dean of Indiana University, writing in support of the Kinsey Reports' impact on law, astutely predicted:

> The principal impact of the Kinsey Report will be at the level of the administration of the law. It will provide the statistical support which police officers, prosecutors, judges, probation officers and superintendents of penal institutions need for judging individual cases . . . Officials will read it. Defense counsel will cite it. Even when it is not offered into evidence, it will condition official action. Psychiatrists, psychologists, penologists, juvenile and probation officers all participate in modern penal procedures — they will use the data and their professional advice will be heeded by the judge. Here the Report will control many decisions and dictate the disposition and treatment of many offenders.[45]

Just as Professor Horack looked forward, Carol Cassell, when president of the American Association of Sex Educators, Counselors and Therapists (AASECT), looked back,

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[44] Report of the Illinois Commission on Sex Offenders, March 15, 1953, p. 9.

[45] Frank E. Horack, Jr. *Sex Offenses and Scientific Investigation*. 44 ILLINOIS LAW REVIEW, 156, 158 (1950) (emphasis supplied).

she confirmed The Kinsey Reports as the root of their professional authority and success in the group's monthly organ, Contemporary Sexuality,

> Look how we've used the Kinsey data. We've used it for everything from assessing the stability of marriage to raising children to trying to understand human growth and development — not just sexual but also psychological growth and changes over time.[46]

Concurrent with the publication of Indiana University's and the Kinsey Institute's *Male* and *Female* volumes, a number of states conducted 'fact-finding" commissions to study sex crime problems. Pomeroy states that Kinsey personally worked on "the revision of sex laws" with Illinois, New Jersey, New York, Delaware, Wyoming, and Oregon commissions.[47]

In December 1949, Kinsey testified for an entire day before the "California Subcommittee on Sex Crimes." Kinsey told the committee:

> For the last 11 years we have had a research project, as you know, underway at the university on human sexual behavior . . . we find that 95 percent of the [male] population has in actuality engaged in sexual activities, which are contrary to the law.[48]

In 1951, the Illinois legislature funded a commission to study the sex offender. Francis Allen chaired the committee that drafted the report submitted to the Illinois legislature. Under Section II, "Scientific Findings," Allen writes: "No specific reference to the Kinsey findings is made here since these permeate all present thinking on this subject." Allen also chaired the workgroup "Framework for Sex Offender Laws" to which Alfred C. Kinsey and Wardell Pomeroy served as consultants.[49]

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[46] Cassell, C., October 1991. *Contemporary Sexuality*, The American Association of Sex Educators, Counselors and Therapists (AASECT).

[47] Wardell Pomeroy, Dr. Kinsey and the Institute for Sex Research, 210-11 (1972).

[48] Preliminary Report of the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process, California Assembly, March 8, 1950, reported in foreword, unnumbered.

A similar commission was conducted in New Jersey and the report was facilitated by Paul W. Tappan, who would be a Reporter for the ALI Committee which drafted the Model Penal Code. Section II of the New Jersey report is titled: "Sex Deviation: Its Extent and Treatment." It begins with quotations from Kinsey's Male volume. The New Jersey Commission expressed its gratitude to Dr. Kinsey and Morris Ploscowe for their "frequent and extended consultations." [50]

The New Jersey Commission's report stated:

> [T]here can be no real doubt that a very large number of the male population of New Jersey has engaged in practices coming within the enumerations of our present abnormal sex offender law, on the basis of which they might be committed to one of our state mental hospitals.[51]

The significant influence of the Kinsey Reports is also evident in the case at bar. The majority opinion in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986) noted that prior to 1961, "all 50 states outlawed sodomy." 478 U.S. at 194. It added that the first state to decriminalize sodomy, Illinois, did so in that year when it "adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct." *id.*, at 194, n. 7. The Texas Court of Appeals cited the unreliable Kinsey Reports for the proposition that only fifty percent of the population remains exclusively heterosexual. *Lawrence v. State*, 41 S.W.3d 349, 353 n. 6 (Tex. App. - Houston [14th Dist.]

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[49] Report of the Illinois Commission on Sex Offenders, March 15, 1953, at 9.

[50] Report and Recommendations of the Commission on the Habitual Sex Offender as Formulated by Paul W. Tappan, Technical Consultant, February 1, 1950 at 12.

[51] *Id.*, at 18.

2001). The instant Petitioners also cited The Kinsey Reports for this proposition. Brief of Petitioners at 12.

Louis B. Schwartz, author of the Sex Offense section of the Model Penal Code, reviewed Kinsey's Male Volume in the University of Pennsylvania Law Review in 1948. His article provided the new language that was used to normalize deviate sexual conduct for the American bench and bar. Schwartz wrote:

> To reveal that certain behavior patterns are widespread, that they are a product of environment, opportunity, age and other factors over which the individual has little control, that they are not objectively harmful except as a result of society's efforts at repression (Kinsey, pp. 385-86) to point out that similar behavior is encountered among other animals than man, to suggest that the law ought not to punish and that psychiatrists might better devote themselves to reassuring the sexual deviate rather than attention to "redirect behavior" (Kinsey p. 660) - all these add up to a denial that sexual "perversion" is an evil.[52]

Schwartz then pictures "the distant day when Americans cease to regard minority morals as a legitimate object of social coercion," and suggests a covert and undemocratic method for change in state criminal codes:

> Eventually, such distinctions ease themselves into the written law, especially if it can be done in the course of a general revision of the penal code. This avoids the appearance of outright repudiation of conservative moral standards, by presenting the changes in a context of merely technical improvements.[53]

Although a number of new studies have now appeared in an attempt to support Kinsey's discredited and debunked "junk science," the decriminalization of sodomy originated in a single source – Indiana University's Kinsey Reports.

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[52] Louis B. Schwartz, *Book Reviews: Sexual Behavior in the Human Male*, 96 University of Pennsylvania Law Review 917 (1948)

D. State Law Journals Advocate for Penal Reform using Kinsey as authority

The ALI penal reform campaign appealed to the bench and bar via states' Law Journals, citing the Kinsey Reports as the "scientific" authority to define normal and therefore non-criminal behavior. The North Carolina Law Review testifies to its readers:

> More than two decades have passed since the publication of Alfred Kinsey's study on human sexual behavior that made clear the wide disparity between conservative sexual behavior permitted by law and the liberal sexual practices that Kinsey found actually to occur in society. Dr. Kinsey stated that "[s]ex laws are so far at variance with general sex practices that they could not conceivably be rigorously enforced. (Citing to 23 New York University Law Quarterly Rev. 540, 541 (1948), quoting Kinsey's Male volume.) The North Carolina sodomy statute is an example of an antiquated law in need of reform.

Other states cite the Kinsey Report data to advocate prostitution (Maine, 1976); boy prostitutes (Duke University, 1960); lightening sex crime penalties (Ohio, 1959); legalizing homosexuality (South Dakota, 1968); "beneficent concern for pedophiles" (Georgia, 1969); general revision (Oklahoma, 1970); 95% of males are sex offenders (Oregon, 1972); young children are seducers (Missouri, 1973, Tennessee, 1965); bias against judges "severe condemnation of sex offenders" (Pennsylvania, 1952);[54] and finally, the Colorado Law Review ridicules American standards of virtue,

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[53] *Schwartz, supra.*

[54] Judy Potter, *Sex Offenses*. 28 Maine Law Review 78 (1976); Albert J. Reiss, *Sex Offenses: The marginal status of the adolescent*. 25 Law and Contemporary Problems 311-312 (1960); Phillip E. Stebbins, *Sexual Deviation and the Laws of Ohio* 20 Ohio State Law Journal 347 (1959); Ronald P. Johnsen, *Sodomy Statutes—A Need for Change*, South Dakota Law Review 395-396 (Spring, 1968); B. E. C., Jr. *Pedophilia, Exhibitionism, and Voy*

(Continued next page)

honor and chastity by publishing "The Legal Enforcement of Morality" authored by none other than *Playboy's*, pornographer Hugh Hefner. Claiming to be Kinsey's "pamphleteer," Hefner writes to his legal audience,

> Kinsey reports that in some groups among lower social levels, it is virtually impossible to find a single male who has not had sexual intercourse by the time he reaches his mid-teens.[55]

Revision Commissions reported to state legislatures that the Model Penal Code was their blueprint for complete revision, generally occurring for the first time since statehood, across the nation.[56]

In the rush to "science-based legal reform," not all state commissions accepted the sweeping revisions as an assumed improvement in the "clarification of law." In 1970 the Michigan Journal of Law Reform published the report of

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(Continued from preceding page)

eurism: Legal Problems in the Deviant Society 4 GEORGIA LAW REVIEW 152 (1969); Larry E. Joplin, *Criminal Law: An Examination of the Oklahoma Laws Concerning Sexual Behavior*, 23 OKLAHOMA LAW REVIEW 459 (1970); Edward N. Fadeley. *Sex Crime in the New Code*, 51 OREGON LAW REVIEW 517 (1972); Orville Richardson, *Sexual Offenses Under the Proposed Missouri Criminal Code*, 38 MISSOURI LAW REVIEW 383 (1973); Ralph Slovenko and Cyril Phillips, *Psychosexuality and the Criminal Law*, 15 VANDERBILT LAW REVIEW 809 (1962); Jerome Hall, *Science and Reform in Criminal Law*, 100 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 733 (1952).

[55] Hugh Hefner. *The Legal Enforcement of Morality*. 40 UNIVERSITY OF COLORADO LAW REVIEW 200 (1967).

[56] See for example, The New Jersey Penal Code, Final Report of the New Jersey Criminal Law Revision Commission, October, 1971, at x; Morgan S. Bragg, *Victimless Sex Crimes: To the Devil, Not the Dungeon*, 25 UNIVERSITY OF FLORIDA LAW REVIEW 140 (1973); John S. Eldred, *Classification and Degrees of Offenses—An Approach to Modernity*, 57 KENTUCKY LAW JOURNAL, 81 (1968-69); John C. Danforth, *The Modern Criminal Code for Missouri (Tentative Draft)—A Challenge Fulfilled and the Challenge Presented*, 38 MISSOURI LAW REVIEW, 362 (1973); Paul E. Wilson, *New Bottles for Old Wine: Criminal Law Revision in Kansas*, 16 Kansas Law Review, 588 (1968).

the director of the Criminal Law Revision Commission in California describing the advisory board's reaction to its "revision":

> . . . its product at first inspection struck most of the members of the Board, unfamiliar with the Model Penal Code or another contemporary criminal law revision, as a strange and baffling departure from all of the familiar landmarks of conventional law. The style of the Model Penal Code, its rigorously logical order and its general abandonment of common law terminology does pose difficulties for anyone whose entire educational and professional experience has been circumscribed by the eighteenth century common law concepts still preserved in the criminal law of California. The staff, of course, was greatly influenced by the Model Penal Code."[57]

VII. CONCLUSION

> "Alfred Kinsey was a moral revolutionary in scientist's clothing. The science was bad, even bogus; the man himself may now be forgotten; but the revolution came to stay, with a vengeance. Kinsey's message—fornicate early, fornicate often, fornicate in every possible way—became the mantra of a sex-ridden age, our age, now desperate for a reformation of its own."[58]

The Kinsey Reports, well known to sexual and legal revolutionaries, are all but unknown to the current bench and bar. Kinsey's once taunt "official mystique" sags now with many troubling revelations, since 1997. However, Kinsey's reputation still must be maintained because his Reports are the foundation of evolutionary sexuality worldwide. Sexual anarchists everywhere need "Kinsey," so an

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[57] Sherry, Arthur H., *Criminal Law Revision in California*, 4 JOURNAL OF LAW REFORM 433 (1971).

[58] Joseph Epstein, COMMENTARY, January, 1998. At www.Britannica.com, downloaded March 31, 2001

image reconstruction effort is being mounted by Hollywood, Myriad Pictures and Coppola's American Zoetrope studios. Reinventing Kinsey as "sexual pioneer" may continue to cover up the ugly reality of the Indiana University zoologist, eugenicist, evolutionist, pedophile collaborator Kinsey and his assault on the Law's majesty, **and maybe not.**

The manufactured statistics of The Kinsey Reports transformed "normal" human sexuality into another image, which became indelible, when the American Law Institute put The Kinsey Reports junk science into 1955 Draft #4, "Sexual Offenses," Section 207, of the Model Penal Code and sent it to the bench and bar in every state where, based on the ALI MPC and the Kinsey Reports, their long-settled and fixed common law standard was abolished via misinformed legislation and judicial decisions.

Prior to 1950 American Law largely prohibited any sexual acts outside of marriage. Marriage was a public contract, both civil and religious. Society had an interest in the security and solvency of every marriage. Marriage was to provide for the progeny of the union, secure the orderly passage of property to the next generation and prevent any burden to the State wrought by divorce, promiscuity, perversion and "unnatural" acts.[59] Marriage served the "public interest," but the "experts" of the ALI MPC dismantled the institution, based on the Kinsey Reports, by recommending the legalization of fornication, cohabitation, adultery, sodomy, etc., all suddenly "private" behaviors between "consenting" individual(s). The new free-

[59] WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). "The act of uniting a man and woman for life ; wedlock ; the legal union of a man and woman for life. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity, till death shall separate them. Marriage was instituted by God himself for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children."

dom, "Privacy," was to be left alone to pursue one's one sexual "tastes," according to Judge Learned Hand.[60]

The ALI created a "myth of moral equivalents" and equated degenerative acts with generative acts, as Science scaled the fixed and known walls of Law and Biology protecting the "marital act," to the unwalled world of "anything goes" "sexualities." The negative connotation to Sodomite was transformed to the scientific sounding "homosexual," and Sodomy, per os/per anum, was divided euphemistically "oral sex," (now not even considered "sex" by many) and "anal sex." Thanks to Kinsey's pedophile findings of erotic capacities for children from birth, child molestation has been softened to "intergenerational sex" or "adult/child sex," now rampant in Church and State.

The viability of the two standards can be measured. ALI's Schwartz declared of his MPC work; "We have tried to base the criminal law with regard to sex offenses on danger to society rather than moral indignation."[61] Since the legal and sexual revolution has the "danger to society" increased or decreased? The common law governed when divorce was difficult and less prevalent and rates of sexual disease and dysfunction much less. AIDS was nonexistent. The public health reality reported by the CDC is that only 4 percent of infected males were exposed to AIDS through heterosexual contact; while 56% report exposure from sex with men, 22% from drug use (elective acts), 8% from both, and 8 % not identified."[62] Thanks to the ALI, the Law now finds preying on children less offensive as the American

[60] David Allyn, *Supra.*, p. 426.

[61] David Allyn, *Supra*, p. 424.

[62] HIV/AIDS Surveillance Report, CDC, Table 5, AIDS cases by age group, exposure category, and sex, reported through December 1999, United States, Cumulative totals.

Bar Association reported in 1990 that 80% of child molesters serve no time in prison.[63]

It is "self-evident truth" that private acts have enormous economic and social public consequences. February 11, 2003, CIA Director George Tenet, in Congressional testimony, called the new venereal disease, AIDS, a national security threat which undermines economic growth, exacerbates social tensions, diminishes military preparedness, creates huge social welfare costs, and further weakens beleaguered states: The virus respects no border. If, as Justice Brandeis said, law points the way,[64] then the "public" and "privacy" interests are not served by the imposition of an evolutionary law order, polluted by fraudulent science, upon the nation.

Accordingly, Amicus respectfully request that, for the reasons above, the decision of the Texas Court of Appeals must be affirmed as follows:

1. However, the incomplete reasoning and any reliance upon the junk sex science used by the American Law Institute's Model Penal Code is entirely misplaced; or in the alternative
2. Certiorari was improvidently granted;
3. Petitioners are overreaching in their demand that *Bowers v. Hardwick* be overturned, which must be rejected;
4. Finally, this Honorable Court has a duty to recognize that any and all state sodomy statutes overturned based on the ALI Model Penal Code and the Kinsey Reports junk "science" should be overturned.

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[63] AMERICAN BAR ASSOCIATION. 1990. *The Probation Response to Child Sexual Abuse Offenders: How Is It Working?* Executive Summary. State Justice Institute, Grant, SJI-88-llJ-E-015.

[64] LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1986) at 29: "...the conduct of life is to so large an extent determined by the existing legal institutions, that an understanding of the legal system must give you a clearer view of human affairs in their manifold relations, and must aid you in comprehending the conditions, and institutions by which you are surrounded."

Respectfully submitted,

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IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE
and TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Appeals for the Fourteenth District

BRIEF *AMICUS CURIAE* OF THE CENTER FOR THE ORIGINAL INTENT OF THE CONSTITUTION IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 02-102

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

THE STATE OF TEXAS,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CENTER FOR THE ORIGINAL INTENT OF THE CONSTITUTION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS IN THIS CASE*

The Center for the Original Intent of the Constitution (COIC) operates under the auspices of Patrick Henry College. The COIC contends that the interpretation of the Constitution according to the original intent of the Founders provides the only sure safeguard for the preservation of limited government and individual rights. The

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* All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

COIC exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect both the authority of the states and the liberties of the people.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. CONST. pmbl. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential, not only because of their place in our nation's history, but also because of their position as the elected representatives of the people. We preserve self-government by elevating the written will of those elected officials who wrote and ratified the Constitution over the opinions of unelected judges.

SUMMARY OF ARGUMENT

The central purpose of this brief is to respond to various historical arguments raised in three *Amici Curiae* briefs filed on behalf of Petitioners by the American Civil Liberties Union ("ACLU Brief"), the Cato Institute ("Cato Brief"), and the Brief of Professors of History ("Historians Brief").

Contrary to the imaginative arguments contained in these briefs, the history of this country reflects a deep conviction that sodomy is criminally punishable conduct and not a constitutionally protected activity. The history of both state legislation and court decisions support the view adopted by this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), namely that neither the Bill of Rights nor the Fourteenth Amendment limit the authority of the states to punish homosexual sodomy.

Petitioners' *amici* inaccurately suggest that there was a de facto rule protecting consensual same-sex sodomy since the early days of the Republic. The proof of this argument is to be found, they contend, in a number of cases where sodomy convictions were reversed because they had been based on nothing more than the testimony of the accomplice—that is, the willing partner in the alleged sexual activity. However, even a cursory review of these cases reveals that the reason for the dismissal was found in a simple rule of evidence that is equally applicable to cases involving horse thieves or perjurers. Many states had the rule that a criminal conviction could not be sustained upon the testimony of an accomplice alone. If the testimony was corroborated, then the conviction could stand. This was a rule of evidence governing all crimes giving no more rise to a claim of constitutional protection for sodomy than it does for horse theft.

The Texas law is grounded on a moral judgment. There is nothing irrational or arbitrary about such a judgment upon which to base a valid Equal Protection claim. Those who wish to legalize sodomy have been quite successful, in the years since *Bowers*, in in repealing these laws. This Court should decline to constitutionalize an issue that belongs in the state legislatures.

I.

THE HISTORIC AUTHORITY OF THE STATES TO CRIMINALIZE SODOMY IS WELL-SETTLED

The historical evidence clearly shows that state legislatures have always possessed a broad authority to outlaw private, consensual sex, and that they also prohibited same-sex sodomy specifically since the earliest days of American history. Enactment

of the Bill of Rights in 1791 and the Fourteenth Amendment in 1868 did not alter that state legislative authority.

This Court has frequently looked to the Constitution's "text, history and precedent" to determine its meaning. *Eldred v. Ashcroft*, ___ U.S. ___, 123 S.Ct. 769, 777 (2003). As this Court recently reiterated in *Eldred v. Ashcroft*, "a page of history is worth a volume of logic." *Id.*, quoting *New York Trust Company v. Eisner*, 256 U.S. 345, 349 (1921); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 790 (1995) ("Against this historical background, we viewed the Convention debates as manifesting the Framers' intent that the qualifications in the Constitution be fixed and exclusive.").

It is a settled constitutional principle within our federal republic that states possess general police powers. Inherent within these powers lies the duty to regulate the "health, safety, and morals" of their members. *Barnes v. Glen Theater*, 501 U.S. 560, 569 (1991) (referencing public indecency statutes which were designed to protect morals and public order). States have used this police power to promote marriage and direct the sexual activities of their citizens into marriage by criminalizing a wide variety of nonmarital sex acts, such as polygamy, rape, fornication, adultery, prostitution and incest. While crimes such as rape and incest are not consensual, adultery, prostitution, polygamy and fornication are private acts between consenting adults that have been regulated throughout our nation's history. As we shall demonstrate, states have possessed and properly exercised the authority to regulate deviate sexual conduct including sodomy at all relevant times in our nation's history.

The historical briefs filed by Petitioners' *Amici Curiae* erect numerous straw men by referencing Senator Joseph McCarthy,[1]

[1] Historians Brief at 16; Cato Brief at 13; ACLU Brief at 20 & n. 39.

using phrases like "same-sex couples"[2] and "Homosexual Conduct Law",[3] and generally discussing everything except the text of the Texas statute at issue.[4] The Historians Brief, in particular, shines the spotlight on Hollywood (p. 15), employment law (pp. 17, 25), medicine (p. 21), the Senate (pp. 15-16), modern religious denominations (pp. 21-22), child custody (p. 25), and other "recent historical scholarship" (p. 29). We confine our analysis to the sources this Court has consistently employed for constitutional analysis and avoid irrelevant, albeit entertaining, issues like the treatment of homosexuality by Hollywood.

Five arguments from the historical briefs warrant specific refutation: 1) the prohibition of same-sex sodomy is a creation of the recent past with no true roots in historical or religious tradition; 2) there is no historical support for the prohibition of sodomy because statutory language has changed; 3) case law reveals our nation has traditionally protected sodomy between "consenting adults acting privately"; 4) the lack of enforcement of sodomy laws and a "national trend" of liberalization warrant this Court's extension of a fundamental privacy right to same-sex sodomy; and 5) the Equal Protection Clause prohibits the states from banning same-sex sodomy.

[2] Historians Brief at 11; Cato Brief at 18 ("gay [male-male] couples"); ACLU Brief at 28.

[3] Historians Brief at 1; Cato Brief at 1.

[4] Only the Cato Brief uses language from the statute (p. 1) and cites the statute (p. 28). Neither the text of the statute nor the citation appear in the other two historical briefs.

A. Proscriptions Against Sodomy Have Deep Religious, Political, and Legal Roots.

Sodomy was considered a heinous crime under common law.[5] Blackstone's writings are widely recognized as the best embodiment of English common law. His *Commentaries* were the standard legal textbook in the early days of our nation, and that work was frequently cited by early American courts. In this work, Blackstone discussed the "infamous crime against nature" and referenced the royal edicts prescribing its punishment.[6] Blackstone

[5] "Buggery is . . . committed by carnall knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with bruite beast." Edward Coke, *The Third Part of the Institutes of the Laws of England* 58-59 (1641). Thus, the term included anal intercourse between two men. *See also Stafford's Case*, 12 Co. Rep. 36, 37, 77 Eng. Rep. 1318 (1607).

[6] Blackstone referred to the "infamous crime against nature" as "a crime not fit to be named; '*peccatum illud horribile, inter christianos non nominandum.*'" 4 *Commentaries* *215-16. Under Henry VIII, English law punished "buggery" in this fashion:

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm for the detestable and abominable Vice of Buggery committed with mankind or beast: It may therefore please the King's Highness with the assent of the Lords Spiritual and the Commons of this present parliament assembled, that it may be enacted by the authority of the same, that the same offence be from henceforth adjudged Felony and that such an order and form of process therein to be used against the offenders as in cases of felony at the Common law. And that the offenders being herof convict by verdict confession or outlawry shall suffer such pains of death and losses and penalties of their goods chattels debts lands tenements and hereditaments as felons do according to the Common Laws of this Realme. And that no person offending in any such offence shall be admitted to his Clergy, And that Justices of the Peace shall have power and authority within the limits of their commissions and Jurisdictions to hear and determine the said offence, as they do in the cases of other felonies.

described the offense itself as one of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, *Commentaries* *215. The common law of England, including its prohibition of sodomy, provided the basis for the original state sodomy laws.

In early America, the Bible served as the source for many criminal laws. Early colonial statutes often quoted the Biblical passages of Leviticus 18:22 ("Thou shalt not lie with mankind as he lieth with womankind; it is an abomination.") and 20:13 when establishing prohibitions against sodomy.[7] States not using the Leviticus language referred to prohibited conduct as the "crime against nature." The phrase "crime against nature," which appears in Blackstone's *Commentaries* and numerous state statutes, harkens back to the Apostle Paul's condemnation in Romans 1:26-27 of those who "change the natural use into that which is against nature,"[8] as other *amici* have noted. Historians Brief at 5. However, their brief incorrectly concludes that Paul did not consider the phrase to apply to same-sex behavior. *Id.*

25 Henry VIII, ch. 6 (1553). After a brief repeal by Queen Mary I, Queen Elizabeth I reenacted the punishment and made it permanent. 5 Eliz. ch. 17 (1562).

[7] *See, e.g.*, Connecticut, *Public Statute Laws of the State of Connecticut*, 1808 tit. LXVI (66), Chap. 1 § 2, p. 295; Massachusetts, *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, p. 187, Act of Mar. 3, 1785; New Hampshire, *of New Hampshire*, 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791).

[8] "For this cause God gave them up unto their vile affections for even their women did change the natural use into that which is against nature: And likewise also the men leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves of their error which was meet." Romans 1:26-27 (KJV).

Contrary to the assertion in the Historians Brief at 5, Paul's lack of reference to Sodom does not negate his condemnation of what we now term sodomy.[9] The Leviticus prohibition against sodomy made no reference to the destruction of the city of Sodom, but the command was clear nevertheless. Those who drafted early state and colonial laws drew on this Biblical background as the best means to express what was otherwise deemed unspeakable.[10]

The Historians Brief at 4, argues that states are "strikingly inconsistent in their definition of the acts encompassed by the term [sodomy]." The Historians Brief at 5. It then proceeds to discuss the variety of definitions for "unnatural acts" presented in "Latin theology, canon law, and confessional practice." Although the scope of prohibited "unnatural acts" may have varied from generation to generation, until very recent times, same-sex sodomy has been included in virtually every state's list of prohibited sexual acts.

Thomas Jefferson, the primary author of the Declaration of Independence, is one of the Founders who saw no inconsistency between the principles of individual liberty and the state prohibition of sodomy. In a letter to Edmund Pendleton dated August 26, 1776, Jefferson discussed his opinions on proper penalties for criminal activity. At the time of the Revolution, most states punished sodomy by death.[11] According to Jefferson, however,

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[9] Although the Apostle Paul did not refer to Sodom and Gomorrah in Romans 1: 26-27 (the "crime against nature" passage); later in the same epistle, Paul referenced the towns of Sodom and Gomorrah in an obviously negative light. *See Romans* 9:29.

[10] *See* Part I.C, *infra*.

[11] Connecticut, *Public Statute Laws of the State of Connecticut*, 1808 tit. LXVI (66), ch. 1 § 2, at 295 (enacted Dec. 1, 1642); Massachusetts, *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, at 187 (enacted Mar. 3, 1785); New Hampshire, *Laws of New Hampshire*, 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791); New York, 2 *Laws of New* York 1777-1789, ch. XXI (21), at 45 (enacted Feb. 14, 1787); North Carolina, 1 *The Revised Statutes of the State of North Carolina*, Passed by the General Assembly at the Session of 1836-7, at 293, 297-98 (enacted Oct. 16, 1749); Rhode Island, *Public Laws of the State of Rhode Island and Providence Plantations*, 1798, § 8, p. 586; South Carolina, 2 *Statutes of South Carolina* at 465, 493 (enacted Dec. 12, 1712); Virginia, 9 *Hennings Statutes of Virginia* 1775-1778, ch. V (5) § VI, at 127 (enacted May 1776).

> Punishments I know are necessary, & I would provide them, strict & inflexible, but proportioned to the crime. Death might be inflicted for murder & perhaps for treason if you would take out of the description of treason all crimes which are not such in their nature. Rape, buggery &c—punish by castration.[12]

Although Jefferson recommended a different punishment, he still believed that sodomy was a criminal offense.

As commander of the Continental Army in 1778, George Washington dishonorably discharged Lieutenant Enslin for attempting to commit sodomy with another soldier, John Monhort. In his military order, Washington stated his deep disdain for the crime of sodomy:

> His Excellency the Commander in Chief approves the sentence and with abhorrence and detestation of such infamous crimes orders Lieut. Enslin to be drummed out of camp tomorrow

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[12] Thomas Jefferson, *Writings* 756-57 (Merrill D. Peterson ed., Library Classics of the U.S. 1984).

morning by all the drummers and fifers in the Army never to return.[13]

James Wilson, both a signer of the Declaration and the Constitution and one of the original Justices of this Court, wrote a commentary on American law. James Wilson, 2 *The Works of James Wilson* (1967) (from lectures given in 1790 and 1791). When the subject turned to sodomy, Wilson refused even to discuss the details of the act: "The crime not to be named [sodomy], I pass in a total silence." *Id.* at 656.

These examples from some of early America's key statesmen demonstrate the cultural atmosphere at the time of our nation's founding. It is clear that none of them ever envisioned a day when the federal Constitution would be used as a tool to overturn the decisions of elected state representatives concerning the punishment of sodomy.

B. The History of State Legislation Reveals That Same-Sex Sodomy Was Uniformly Condemned.

States freely prohibited same-sex sodomy throughout America's history, as well as other nonmarital sexual activity, such as polygamy, adultery, fornication and prostitution. The legislatures perceived no restraint on their power to do this by either the Bill of Rights or the Fourteenth Amendment. Since the passage of these Amendments, state laws have varied, but this fact simply supports the conclusion that this area of law was entirely in the hands of the states. No connection can be established between either the adoption of the Bill of Rights or the Fourteenth Amendment and alterations in sodomy statutes. An examination of

[13] George Washington, *The Writings of Washington*, John C. Fitzpatrick, ed. (Washington, D.C.: U.S. Government Printing Office, 1932), Vol. XI, pp. 83-84, from General Orders at Valley Forge on March 14, 1778.

the history of sodomy statutes does not lend credence to the contention by several briefs that sodomy statutes were rarely, if ever, enforced following the passage of the Bill of Rights. ACLU Brief at 11, 12; Historians Brief at 7.

At the time of the passage of the Bill of Rights in 1791, ten of the states clearly banned same-sex sodomy. At that time, twelve of the thirteen original states prohibited sodomy either by statute or by their adoption of the English common law.[14] Two of these prohibitions do not explicitly define the crime, but the other ten states specifically prohibited same-sex sodomy. Five of the states banned same-sex sodomy by statute, and the other five prohibited same-sex sodomy because of their adoption of English common law[15] In 1776, for example, Maryland had adopted its Declaration

[14] Georgia is the only state not to have clearly adopted English common law or a sodomy statute by 1791. However, Georgia did adopt such a statute later, showing that its Legislature did not believe the new Bill of Rights limited its authority to criminalize sodomy. Georgia certainly *punished* sodomy – in 1734, a man received 300 lashes for engaging in sodomy. 3 *Detailed Reports on the Salzburger Emigrants Who Settled in America . . . Edited by Samuel Urlsperger* 314 (William H. Brown, trans., Athens, GA: Univ. of Georgia Press, 1972). In 1743, another man received the death penalty. 2 *The Journal of William Stephens* 1743-1745 3 (E. Merton Coulter, ed., Athens, GA: Univ. of Georgia Press, 1958-59).

[15] Five states had statutory provisions against same-sex sodomy: Connecticut, *Public Statute Laws of the State of Connecticut*, 1808 tit. LXVI (66), ch. 1 § 2, at 295 (enacted Dec. 1, 1642); Massachusetts, *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, at 187 (enacted Mar. 3, 1785); New Hampshire, *Laws of New Hampshire*, 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791); New York, 2 *Laws of New* York 1777-1789, ch. XXI (21), at 45 (enacted Feb. 14, 1787); North Carolina, 1 *The Revised Statutes of the State of North Carolina*, Passed by the General Assembly at the Session of 1836-7, at 293, 297-98 (enacted Oct. 16, 1749). Five states adopted English common law with its explicit prohibition of same-sex sodomy: Delaware, *Laws of the State of Delaware* 1797, ch. 22a § 5, at 67 (enacted 1719); Maryland, *Maryland Laws, Thomas Sim Lee, Esq., Governor,* ch. LVII (57), art 10; New Jersey, *Acts of the*

of Rights which incorporated the English common law along with its sodomy prohibition.[16] Six years prior to the passage of the Bill of Rights, Massachusetts enacted a law that prohibited sodomy. The application of that law continued after the ratification of the Bill of Rights.[17] Earlier in the same year the Bill of Rights was ratified, New Hampshire revised its 1679 sodomy law to a same-sex sodomy statute which was still on the books in 1805.[18] Importantly, none of the states viewed the ratification of the Bill of Rights as limiting or removing the power of the legislatures to ban sodomy, including same-sex sodomy.

At the time of the Fourteenth Amendment's ratification, eight states specifically prohibited same-sex sodomy, including five of the original states which retained their earlier sodomy laws.[19] At

General Assembly, ch. DC (600) § 7, at 93 (enacted Mar. 18, 1796); South Carolina, 2 *Statutes of South Carolina* at 465, 493 (enacted Dec. 12, 1712); Virginia, 9 *Hennings Statutes of Virginia* 1775-1778, ch. V (5) § VI, at 127 (enacted May 1776). Two states had general sodomy statutes: Rhode Island, *Public Laws of the State of Rhode Island and Providence Plantations,* 1798, § 8, p. 586; and Pennsylvania, *Statutes at Large of Pennsylvania,* 1682-1801 vol. 13, (1682-1801), p. 511, chap. MDXVI (1516) (enacted Apr. 5, 1790).

[16] *See* Part I.A. *infra.*

[17] *Perpetual Laws of the Commonwealth of Massachusetts*, 1780-1789, at 187 (enacted Mar. 3, 1785).

[18] *Laws of New Hampshire* 1784-1792, ch. 42, at 596 (enacted Feb. 8, 1791).

[19] Five original states retained their laws with only minor changes: New Hampshire, *Public Laws of New Hampshire June* 1812 5-6 § 6 (enacted June 19, 1812); New Jersey, *A Digest of the Laws of New Jersey* 162 § 9 (enacted Apr. 16, 1846); New York, *Revised Statutes of the State of New York*, at 46 (enacted Dec. 10, 1828); South Carolina, *Laws of South Carolina* 1868-1871 175 (enacted Feb. 4, 1869); Virginia, *The Code of Virginia. Second Edition, Including Legislation to the Year* 1860 (enacted Mar. 19, 1860). Georgia

least two more state courts explicitly applied the same-sex definition of common law sodomy.[20] For example, New Hampshire's 1812 same-sex sodomy law remained in effect after 1868, with only the penalty altered.[21] And New Jersey's prohibition of same-sex sodomy was in force both before and after the ratification of the Fourteenth Amendment.[22] At least twenty-two of the remaining states outlawed sodomy, although the definition of the crime also included acts committed by members of the opposite sex.[23] Although sodomy was not universally

clarified its law, *see* note 9, *infra*. Two states admitted after 1791 prohibited same-sex sodomy by adopting Virginia's law: Kentucky, 1 *Digest of Kentucky Statute Law* 36 § 8 (Littell & Swigert, eds., Frankfort, KY: Kendall & Russell, 1822) (incorporating English common law through Virginia law); 2 *Digest of the Statute Laws of Kentucky of a Public and Permanent Nature* 1265 § 4 (Frankfort: Albert G. Hodgen, 1834) (lowering the penalty, but retaining the criminal statute); West Virginia, *West Virginia Const.*, art. XI § 8 (1863) (incorporating English common law through Virginia law).

[20] "Sodomy is a connection between two human beings of the same-sex – the male – named from the prevalence of the sin in Sodom." *Ausman v. Veal*, 10 Ind. 355 (May Term 1858) (defining the term "sodomy" as used in a slander case); *Coburn v. Harvey*, 18 Wis. 147 (Jan. Term 1864) (Wisconsin Supreme Court construed the history of Wisconsin as having adopted the common law of England, thus incorporating its same-sex sodomy law).

[21] *Public Laws of New Hampshire* June 1812 5-6 § 6 (enacted June 19, 1812).

[22] *A Digest of the Laws of New Jersey* 162 § 9 (enacted Apr. 16, 1846). Interestingly, New Jersey also added sodomy to the list of crimes that would support a death sentence in a felony-murder conviction. *Id.* At 161 § 3.

[23] Alabama, *Ala. Rev. Code* 3604 (1867); Arkansas, *Ark. Stat.*, ch. 51, Art. IV, 5 (1858); California, Statutes 1850, ch. 99, § 48, p. 99; Connecticut, *Conn. Gen. Stat.*, Tit. 122, ch. 7, 124 (1866); Delaware, *Del. Rev. Stat.*, ch. 131, 7 (1893); Florida, *Fla. Rev. Stat.*, div. 5, 2614 (passed 1868) (1892); Illinois, *Ill. Rev. Stat.*, div. 5, 49, 50 (1845); Louisiana, *La. Rev. Stat.*, Crimes and Offences, 5 (1856); Maine, *Me. Rev. Stat.*, Tit. XII, ch. 160, 4 (1840); Maryland, 1 *Md.*

proscribed, all thirty-one states that prohibited sodomy necessarily included same-sex sodomy in their definitions. No state viewed the Fourteenth Amendment as limiting their authority to enact statutes prohibiting same-sex sodomy.

C. The Records of Appellate Courts Do Not Support the Claim That the States Avoided Prosecuting or Condemning Same-Sex Sodomy.

The historical briefs[24] contend that shadows indicating the right of consensual sodomy can be discovered in the fact that enforcement efforts appear to be sparse on the record found in appellate decisions. Several historical and logical fallacies underlie this argument.

First, appellate case law is not the best source for accurate social science research, concerning either current law or more distant history. Generally, many convictions are not appealed.

Second, and more importantly, the *amici* making this argument, particularly the ACLU, concede that a great majority of the reported cases contain factual situations that they deem

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Code, Art. 30, 201 (1860); Massachusetts, *Mass. Gen. Stat.*, ch. 165, 18 (1860); Michigan, *Mich. Rev. Stat.*, Tit. 30, ch. 158, 16 (1846); Minnesota, *Minn. Stat.*, ch. 96, 13 (1859); Mississippi, *Miss. Rev. Code*, ch. 64, LII, Art. 238 (1857); Missouri, 1 *Mo. Rev. Stat.*, ch. 50, Art. VIII, 7 (1856); North Carolina, *N.C. Rev. Code*, ch. 34, 6 (1855); Oregon, *Laws of Ore., Crimes - Against Morality, etc.*, ch. 7, 655 (1874); Pennsylvania, *Act of Mar. 31, 1860*, 32, *Pub. L.* 392, in 1 *Digest of Statute Law of Pa.* 1700-1903, p. 1011 (Purdon 1905); Rhode Island, *R. I. Gen. Stat.*, ch. 232, 12 (1872); Tennessee, *Tenn. Code*, ch. 8, Art. 1, 4843 (1858); Texas, *Tex. Rev. Stat.*, Tit. 10, ch. 5, Art. 342 (1887) (passed 1860); Vermont, *Acts and Laws of the State of Vt.* (1779).

[24] The three *amicus* briefs are those by the ACLU, Cato, and the Historians.

"unclear."[25] Reasoning from silence is always dangerous. This is especially true when, as here, there is a documented revulsion which led to a disinclination to discuss the details of these sexual crimes.

The ACLU reads these allegedly "unclear" cases through the skewed vision of twenty-first century Americans who are accustomed to hearing explicit and graphic depictions of sexual activity. Such was not the case in the early days of America, especially if the subject was same-sex sodomy. Cultural values in those times made people, even judges, highly reluctant to record the particular facts of a case involving consensual sodomy.

The lack of explicit factual detail does not indicate any lack of definitional clarity. Sodomy prosecutions were not unknown. In *Smith v. State*, 150 Ark. 265, 234 S.W. 32, 33 (1921), the court said in one sodomy prosecution, "The evidence is revolting in detail, and it could therefore serve no good purpose to set forth." Moreover, a nineteenth century state court noted, "Every person of ordinary intelligence understands what the crime against nature with a human being is."[26]

Thus, given the reluctance of the courts to provide details, it cannot be said with any certainty that prosecutions for "private sodomy" were out of the ordinary. In fact, some courts expressly indicated that privacy was not a factor in sexual crimes.[27] Others

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[25] Using the ACLU Brief's calculations, approximately 73 Texas cases and 79 cases from other states were "unclear." ACLU Brief at 14 ns. 17 & 18.

[26] *People v. Williams*, 59 Cal. 397, 398 (1881).

[27] *See State v. Gage*, 116 N.W. 596 (Iowa 1908) (ruling that sodomy could be established by witnesses or circumstantial evidence); *Sweenie v. Nebraska*, 80 N.W. 815 (Neb. 1899) (holding that adultery and fornication were crimes

equated "sodomy," or the "crime against nature," with crimes where consent or privacy were irrelevant.[28]

Third, *amici's* assertion that societal approbation for consensual acts of same-sex sodomy can be found in the silence of the appellate records is simply not true. Insofar as appellate courts are the correct measure of societal acceptance of consensual sodomy, it is beyond reasonable dispute that such acts were severely condemned.

In the period immediately following the adoption of the Fourteenth Amendment, appellate court decisions continued to echo the historical revulsion for the act of sodomy and the understanding that consent was no defense. *See, e.g.*, *Commonwealth v. Poindexter*, 118 S.W. 943, 943 (Ky.App. 1909) ("The acts charged against the appellees are so disgusting that we refrain from copying the indictment in the opinion."); *Herring v. State*, 46 S.E. 876, 881-82 (Ga. 1904.) ("After much reflection, we are satisfied that, if the baser form of the abominable and disgusting crime against nature—*i.e.*, by the mouth—had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy."); *Kelly v. People*, 61 N.E. 425, 426 (Ill. 1901) ("We did not say the definition of the crime was 'generic,' but did hold that, because of the abominable nature of the crime, it was not necessary to set forth in detail the manner in which it was committed").

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regardless of privacy); *Hutchinson v. State*, 24 Tenn. 142 (1844) (holding that adultery is an offense no matter how privately the intercourse is carried on).

[28] *See, e.g., Bartholomew v. Illinois*, 104 Ill. 601 (1882) (listing sodomy with burglary, robbery, incest, larceny, forgery, bigamy and others).

Several appellate court decisions have established that consensual activity was clearly prosecutable, and that the existence of consent served only to differentiate evidence requirements. In the context of a case involving incest, the Texas Court of Appeals quotes an authority which is applied to consensual sodomy:

> But alike in adultery and, it is believed, in fornication and in incest, where the crime consists in one's unlawful carnal knowledge of another, it is immaterial whether the other participated under circumstances to incur guilt or not, --just as sodomy may be committed either with a responsible human being, or an irresponsible one, or a beast. [I]t must be considered that in sodomy cases, the question of consent of the party with whom the act is committed, is not a material one. The crime is complete in either case if the act be committed.

Mercer v. State, 17 Tex. Ct. App. 452, 464 (1885) (internal quotation marks omitted).

In *Medis v. State*, 11 S.W. 112 (Tex.Ct.App. 1889), the Texas appellate court discussed the issue of consent, clarifying that the testimony of a third party would be required if both parties consented to the act. In *People v. Hickey*, 41 P. 1027 (Cal. 1897) the California appellate court ruled that "it was not an element in the offense where the act is done or attempted with the consent of the other party." 41 P. at 1028. Consent provided no immunity in a sodomy prosecution.

In *Honselman v. People*, 48 N.E. 304 (Ill. 1897) the Illinois court ruled that uncorroborated evidence alone, given by a consenting partner, was sufficient to convict both parties of sodomy. Citing *Gray v. People*, 26 Ill. 344 (1861), concerning the difficulty of proof, the Illinois court stated, "The offense should be clearly proved, but it is one committed in secrecy and ordinarily

not capable of being otherwise proved than by the testimony of a participant, and the law is, that the uncorroborated testimony of an accomplice is legally sufficient to sustain a conviction." *Honselman*, 48 N.E. at 305. Unlike several other state courts, the Illinois court ruled that corroborating evidence submitted by a third party was not required for the conviction of private, consensual sodomy.

Finally, in *State v. Gage*, 116 N.W. 596 (Iowa 1908), the Iowa court ruled that either third-party testimony or circumstantial evidence of penetration would be sufficient for conviction in a sodomy case. Once again, we see an example of state courts applying sodomy statutes to private, consensual activity. Although some states had higher evidence requirements for conviction, all states cited above clearly held consensual sodomy to be criminally actionable.

D. *Amici* for Petitioners Confuse a General Rule of Evidence with a Constitutional Right.

The Cato Brief places significant weight on a rule of evidence which supposedly created a de facto "immunity for sodomy within the home between consenting adults." Cato Brief at 11. Some states have or had a general rule of evidence that the uncorroborated testimony of one accomplice was not sufficient evidence for conviction.[29] This rule applied to crimes generally, not just sodomy or other sexual crimes where notions of privacy

[29] *See, e.g., State v. Carey*, 122 P. 868 (Nev. 1912) (noting the requirement that an accomplice must be corroborated by other evidence), *People v. Deschessere*, 74 N. Y. Supp. 761 (1902) (same); *People v. Hickey*, 41 P. 1027 (Cal. 1895) (same); *Medis v. State*, 11 S.W. 112 (Tex.Ct.App. 1889) (same).

might arguably play some role.[30] From this rule, the Cato Brief illogically derives the principle that any action between consenting adults within the home was immune from prosecution merely because the testimony of one partner was insufficient evidence.

Even if this were an accurate statement, it would be improper to infer a quasi-constitutional rule of privacy from a mere rule of evidence that was intended to ensure the truth of courtroom testimony, *see e.g. Hicks v. State*, 156 Tenn. 359 (1912) (explaining accomplice rules). There are many cases in which convictions were upheld when there was evidence beyond that supplied by the accomplice.[31]

The requirement of corroborating testimony was not a rule of common law. Several state courts explicitly refused to follow the rule in absence of a statutory provision. *See, e.g., Republic of Hawaii v. Edwards*, 11 Haw. 571 (1898) ("no statute in Hawaii requires that on a charge of sodomy, the testimony of an accomplice should be corroborated by other evidence"); *Honselman v. Illinois*, 48 N.E. 304 (Ill. 1897) ("the law is that the uncorroborated testimony of an accomplice is legally sufficient to sustain a conviction").

[30] *See, e.g., State v. Hull*, 26 Iowa 292 (1868) (rule requiring corroboration for the testimony of accomplice in a case involving two horse thieves); *Anderson v. State*, 20 Tex.App. 312 (1886) (rule applied in a perjury case).

[31] *See, e.g., Jones v. State*, 101 S.W. 1012 (Tex. Crim. App. 1907) (upholding conviction on the testimony of only one witness); *Territory v. Mahaffrey*, 3 Mont. 112 (1878) (convicting upon corroborating testimony); *Commonwealth v. Snow*, 111 Mass. 411 (1873) (same).

Moreover, none of the cases cited by the *amici* regarded consent as an affirmative defense to the charge.[32] The Cato Brief's "consent" argument deduces incorrectly that the primary function of the sodomy laws prior to this century was "filling a regulatory gap as regards non-consensual sexual activity." Cato Brief at 11. Carrying this argument to its logical extreme, their rationale would lead to the conclusion that the Framers also intended the Bill of Rights and the Fourteenth Amendment to prohibit laws against fornication or adultery because those laws forbid private, consensual sex. This is ludicrous. No objective reader of fornication or adultery statutes can conclude that "consent" was a mitigating factor - defense for the crime. Rape statutes provided sufficient grounds for the prosecution of "non-consensual" sex. The evidence indicates that adultery, fornication, and sodomy statutes served the additional purpose of preserving the moral and legal standard that sex was reserved for traditional marriage.

E. Nothing in the History or Text of the Equal Protection Clause Supports a Different Result from This Court's Due Process Clause Decision in *Bowers v. Hardwick*.

A new law is usually intended to change an old law. This is just as true with regard to constitutional amendments as it is with ordinary legislation, with one critical exception. The Bill of Rights was designed to preserve the rights which the founding generation considered to be their natural inheritance.

Thus, the Framers of the Bill of Rights did not purport to "create" rights. "Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties

[32] "It must be considered that in sodomy cases, the question of consent of the part with whom the act is committed, is not a material one. The crime is complete in either case if the act be committed. . . ." *Foster v. State*, 1 Ohio C.D. 261, 1886 WL 2557 at *4 (Ohio Cir. Ct. 1886).

presumed to be pre-existing." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting). "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." T. Cooley, *Constitutional Limitations*, ch. X (4th ed. 1878), quoted in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991) (Scalia, J., concurring).

However, the Fourteenth Amendment, like the Thirteenth and Fifteenth, was intended to change the law. The core purpose of the Fourteenth Amendment was to overturn those state laws that failed to guarantee equal protection and due process to black Americans. This Court's "suspect classification" doctrine closely approximates this intention. With regard to race, all laws existing at the time of the ratification of the Amendment should have been considered presumptively unconstitutional. While this Court has built a complex system of suspect, intermediate, and rational classifications for Equal Protection analysis, it has never held that the Equal Protection Clause was designed to eliminate all state laws which make distinctions between people and their conduct.

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

Oregon v. Mitchell, 400 U.S. 112, 127 (1970)(opinion of Black, J.).

This Court has been reluctant to expand the "suspect classification" to include every group seeking the protection of this constitutional status. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (wealth is not a suspect class); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mental retardation is not a "quasi-suspect" classification). Lawyers lack no diligence in mining the phrases employed by this Court over the decades when endeavoring to argue that their clients should be included in this or another "protected" category. It is the words and phrases of the Framers of the Fourteenth Amendment that must be dispositive if the principle of republicanism—*we elect the rulers who make the law*—is to retain any meaning.

The essence of the Equal Protection Clause prohibits arbitrary treatment of people. *See, e.g., Central State University v. American Ass'n of University Professors*, 526 U.S. 124, 129 (1999) (Ginsburg, J., concurring). Racial discrimination is presumptively arbitrary. But any arbitrary, irrational treatment of people is prohibited. The debate about classifications and levels of scrutiny at times obscures reality; it is only arbitrariness that can possibly explain the outcomes of this Court's Equal Protection jurisprudence. Distinctions based on time-honored standards of law should be accorded some deference, but in the end arbitrary classifications cannot stand.

Texas outlawed same-sex sodomy because it views the practice as immoral. Petitioners' Opening Brief at 37. As this brief fully documents, this position is absolutely consistent with the time-honored traditions of this nation. Unless this Court is prepared to say that the moral traditions of this nation and western civilization are categorically arbitrary, it must affirm the decision below.

This Court has already settled this crucial question in *Bowers*. "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. 186, 196 (1986). It cannot be seriously contended that there is a difference between the Due Process Clause and the Equal Protection Clause insofar as these clauses affect the ability of a state to base its law on moral judgments.

Romer v. Evans, 517 U.S. 620 (1996), has done nothing to change this principle. *Romer* is based on the principle that no group should be limited in its ability to employ the political process for its own protection. *Romer* is fundamentally about political rights, not homosexual rights. States are still free to enact whatever moral judgments they wish regarding homosexual behavior. The briefs supporting Petitioners demonstrate only that those who support the legalization of sodomy have been very successful in moving the legislatures to adopt their moral views.

Moral judgments underlie every law. Disputes about moral choices belong to the legislative arena where the views of the people ultimately have control. This Court simply does not have the constitutional mandate to substitute its judgment for that of the elected representatives of the people on matters that boil down to nothing more than moral judgments.

II.

THIS COURT SHOULD FOLLOW THE ORIGINAL INTENT OF THE FRAMERS AND DECLINE PETITIONERS' INVITATION TO LEGISLATE FROM THE BENCH

A. In a Republic, Laws Are Created Only by Legislatures.

Petitioners and their *amici* have urged this Court to radically rewrite the criminal laws of this nation. Sodomy once was considered a crime so unspeakable that courts declined to describe the behavior in any detail.[33] Now this very reluctance caused by moral revulsion is asserted as a basis for the anti-historical contention that the Framers of the Constitution intended to protect consensual sodomy.

The briefs filed by those who support the legalization of same-sex sodomy demonstrate that they have made significant progress toward their political goals. Far fewer states punish sodomy now than at earlier times in our nation's history.[34] However, unsatisfied with the pace of change, these political advocates ask this Court to finish the process in one swift judicial act. Their argument is cloaked in supposed historical analysis and constitutional

[33] *See, e.g., Honselman v. Illinois*, 48 N.E. 304, 305 (Ill. 1897) ("The existence of such an offense is a disgrace to human nature. The legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of different acts which may go to constitute it."); *Cross v. State*, 17 Tex. Ct. App. 476, 1885 WL 6739 at *2 (1885) ("the crime of sodomy is too well known to be misunderstood, and too disgusting to be defined further than by merely naming it. I think it unnecessary, therefore, to lay the *carnaliter cognovit* in the indictment.").

[34] Cato Brief at 17, 26, Historians Brief at 29; ACLU Brief at 21-24.

reasoning. In reality, these submissions contain wishful thinking presented as accurate history, and political rhetoric thinly disguised as constitutional analysis.

Elected officials in Congress proposed the Fourteenth Amendment. Elected officials in the states ratified the Fourteenth Amendment. If the meaning of the language of the Fourteenth Amendment is twisted from that intended by those who drafted and ratified it, we will witness not an act of social progress but one of judicial tyranny.

John Locke wrote:

> Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society, over whom nobody can have a power to make laws but by their own consent and by authority received from them; and therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts.[35]

Locke quotes Richard Hooker, *Of the Laws of Ecclesiastical Polity* (1593), to demonstrate the tyrannical nature of laws created by any other process.

> The lawful power of making laws to command whole politic societies of men, belonging so properly unto the same entire societies, that for any prince or potentate, of what kind soever

[35] John Locke, *Second Treatise on Civil Government* 74 (Prometheus Books 1986) (1690).

upon earth, to exercise the same of himself, and not by express commission immediately and personally received from God, or else by authority derived at the first from their consent, upon whose persons they impose laws, it is no better than mere tyranny. Laws they are not, therefore, which public approbation hath not made so.[36]

Locke understood the important role of republican governmental principles for the preservation of liberty. Those who fancy the term "civil libertarian," and yet seek to change the law through the judiciary, seek not liberty, but an act that is "no better than mere tyranny."

It is not the role of this Court to inquire into the social policy ramifications of anti-sodomy laws. A ruling based on an examination of such matters would be exactly the sort of judicial legislation that this Court condemned in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 650 (1943). In that case, this Court held: "The framers of the Constitution denied such legislative powers to the federal judiciary . . . [and] did not grant to this Court supervision over legislation." Rather, this Court should consider only those arguments founded on analysis which is truly legal in character.

B. Legislative Trends Do Not Create New Constitutional Rights.

Each of the historical briefs filed in this case notes a "national trend" toward repealing or altering sodomy statutes. State legislatures have indeed made changes to sodomy laws, broadening, narrowing, or abolishing them. However, it does not follow that the alteration or repeal of sodomy statutes in some

[36] *Id.*

states enshrines sodomy as a fundamental right guaranteed by the Bill of Rights and the Fourteenth Amendment. The fact that some states have changed or repealed their sodomy laws provides no support for the thinly veiled request for this Court to act as a "super-legislature."[37] Defining the criminality of certain forms of sexual conduct, such as same-sex sodomy, is a policy issue that has historically and properly been left to the state legislatures.

Prior to her appointment to this Court, Justice Ginsburg criticized the Supreme Court for imposing the broad holding of *Roe v. Wade*, 410 U.S. 113 (1973), on the states. She noted "in my judgment, *Roe* ventured too far in the change it ordered." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985). She further observed that the national trend "toward liberalization of abortion statutes" (also noted by this Court in *Roe*) quickly ended when the Court greatly restricted the states' authority to regulate abortion. *Id.* at 379-80; *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992) ("*Roe v. Wade* . . . invited no dialogue with legislators. Instead, it seemed entirely to remove the ball from the legislators' court.
In 1973, when *Roe* was issued, abortion law was in a state of change across the nation.").

As in *Roe*, this Court has received a request to constitutionalize a divisive and highly visible political issue. Public respect for the rule of law is diminished whenever unelected officials remove the ability of the public to settle moral and political issues in the legislative chamber. Contrast the public reaction to *Bowers v.*

[37] *See Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.").

Hardwick, 478 U.S. 186 (1986), with that to *Roe*. Those disappointed with the *Bowers* decision have successfully petitioned many legislative bodies for change. Opponents of *Roe* march on this Court since there is no other realistic venue for relief.
This Court should stay out of this public policy dispute and leave it to the state legislatures to decide.[38]

[38] Additionally, this Court should dismiss the cert petition as improvidently granted due to the deficient record. This case does not provide the facts for this Court to address the significant issues raised in the Questions Presented involving the constitutionality of private sex acts engaged in by consenting adults. The record in this case only shows that the Petitioners were adult males who engaged in "anal sodomy." Pet. App. 129a. & 141a.

Under the record of this case, the factual possibilities exist that one of Petitioners lacked capacity to consent, that the sodomy was forced, or that Petitioners engaged in commercial prostitution, or performed their act in public view or before an audience. Petitioners have not presented evidence refuting those factual alternatives. It is Petitioners' burden to prove that these facts do not exist in a case, in order to give this Court a clean vehicle to rule on the substantive legal questions. At best, all Petitioners can do is make a facial challenge to the Texas law, which means this Court should apply the standard articulated in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (a party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be valid").

This Court should not reexamine a major Constitutional question, and also overturn an earlier decision when it is unclear that the facts of this case present an opportunity for this Court to rule on such a question *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers Unions v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948) (per curiam) ("Because of the inadequacy of the record, we decline to decide the Constitutional issues involved.").

CONCLUSION

The Texas law prohibits conduct–sodomy between individuals of the same gender–as many other states and their courts have historically done. There is no fundamental right "deeply rooted in this Nation's history and traditions" to engage in same-sex sodomy. *Bowers*, 478 U.S. at 192-193. The Texas Court of Appeals' decision should be affirmed.

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APPENDIX

APPENDIX 1

State Sodomy Laws in 1791

Connecticut

> That if any man shall lie with mankind, as he lieth with womankind, both of them have committed abomination, they both shall be put to death; except it shall appear that one of the parties was forced, or under fifteen years of age; in which case the party forced, or under the age aforesaid, shall not be liable to suffer the said punishment.

The Public Statute Laws of the State of Connecticut, 1808 title LXVI (66), ch. 1, § 2, p. 295.

Delaware

> That if any person or persons shall commit sodomy, or buggery, or rape or robbery, . . . he or they so offending, or committing any of the said crimes within this government, their counsellors, aiders, comforters and abettors, being convicted thereof, as above-said, shall suffer as felons, according to the tenor, direction, form and effect of the several statutes in such cases respectively made and provided in Great Britain; any act or law of this government to the contrary in any wise not withstanding.

Laws of the State of Delaware, 1797, ch. 22a, § 5, p. 67 (passed in 1719).

Maryland

Maryland had no sodomy statute in 1791, but the Declaration of Rights of Maryland, section 3, a portion of the Maryland State Constitution passed in 1776 said "that the inhabitants of Maryland are entitled to the common law of England. . . ." Sodomy was a crime under the common law (see section on North Carolina).

> Every person duly convicted of the crime of sodomy, shall be sentenced to undergo a similar confinement for a period not less than one year nor more than ten years, under the same conditions as are herein after directed.

Maryland Laws, ch.. CXXXVIII (138), art. IV, § 8.

Massachusetts

> That if any man shall lay with mankind as he layeth with a woman, or any man or woman shall have carnal copulation with any beast or brute creature, and be thereof duly convicted, the offender, in either of those cases, shall be adjudged guilty of felony, shall be sentenced to suffer the pains of death, and the beast shall be slain, and every part thereof burned. And be it further enacted by the authority aforesaid, that such order and form of process shall be had and used, in trial of such offenders, and such judgment given, and execution done, upon the offender, as in cases of murder.

Perpetual Laws of the Commonwealth of Massachusetts, 1780-1789, p. 187, Act of March 3, 1785.

New Hampshire

> That if any man shall carnally lie with a man, as a man carnally lieth with a woman, or if any man or woman shall have carnal copulation with any beast, or brute creature, and be thereof convicted, the offender in either of those cases before mentioned, shall suffer death, and the beast shall be slain and burned.

Laws of New Hampshire, 1805, p. 267 (passed February 8, 1791).

New Jersey

> That sodomy, or the infamous crime against nature, committed with mankind or beast, shall be adjudged a high crime and misdemeanor, and be punished by fine and solitary imprisonment at hard labour, for any term not exceeding twenty-one years.

Acts of the General Assembly, March 18, 1796, ch. DC, § 7, p. 93.

New York

> That the detestable and abominable vice of buggery, committed with mankind, or beast, shall be from henceforth adjudged felony; and such order and form of process therein shall be used against the offenders, as in cases of felony at the common law; and that every person being thereof convicted, by verdict, confession, or outlawry, shall be hanged by the neck, until he or she shall be dead.

Laws of New York, ch.. 21, p. 391 (passed February 14, 1787).

North Carolina

When the Bill of Rights was ratified in 1791, North Carolina had adopted the English common law statute of Henry VIII which was the basis for the common law's crime of buggery (see section on South Carolina):

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm, for the detestable and abominable vice of Buggery committed with mankind or beast: It may therefore please the King's Highness, with the assent of his Lords spiritual and temporal, and the Commons of this present Parliament assembled . . . That the same offense be from henceforth adjudged Felony . . . And that the offenders being hereof convict . . . shall suffer such pains of death and losses and penalties of their goods, chattels, debts, lands, tenements and hereditaments, as Felons be accustomed to doe [sic] according to the order of the Common-laws of this Realm. And that no person offending in any such offense, shall be admitted to his Clergy, And that Justices of Peace shall have power and authority, within the limits of their Commissions and Jurisdictions, to hear and determine the said offense, as they do use to doe [sic] in cases of other Felonies . . .

25 Henry VIII, ch. 6.

Pennsylvania

> That the pains and penalties hereinafter mentioned shall be inflicted upon the several offenders who shall from and after the passing of this act commit and be legally convicted of any of the offences hereinafter enumerated and specified, in lieu of the pains and penalties which by law have been heretofore

> inflicted; that is to say, every person convicted of robbery, burglary, sodomy or buggery or as accessory thereto before the fact shall forfeit to the commonwealth all and singular the lands and tenements, goods and chattels whereof he or she was seized or possessed at the time the crime was committed and at any time afterwards until conviction and be sentenced to undergo a servitude of any term or time at the discretion of the court passing the sentence not exceeding ten years in the public gaol or house of correction of the county or city in which the offence shall have been committed and be kept at such labor and fed and clothed in such manner as is herein after directed.

The Statutes at Large of Pennsylvania, 1682-1801, vol. 13, (1682-1801), p. 511, ch. MDXVI (1516).

Rhode Island

> That every person who shall be convicted of sodomy, or of being accessary [sic] thereto before the fact, shall, for the first offence [sic], be carried to the gallows in a cart, and set upon said gallows, for a space of time not exceeding four hours, and thence to the common gaol, there to be confined for a term not exceeding three years, and shall be grieviously fined at the direction of the Court; and for the second offence [sic] shall suffer death.

The Public Laws of the State of Rhode Island and Providence Plantations, 1798, § 8, p. 586, "An Act to Reform the Penal Laws."

South Carolina

> Forasmuch as there is not yet sufficient and condign [sic] Punishment appointed and limited by the due Course of the

Laws of this Realm, for the detestable and abominable Vice of Buggery committed with the Mankind or Beast: (2) It may therefore be enacted, That the same offence be from henceforth adjudged felony, and such Order and Form of Process therein to be used against the Offenders as in Cases of Felony at the Common Law; (3) and that the Offenders being hereof convict [sic] by Verdict, Confession, or Outlawry, shall suffer such Pains of Death, and Losses and Penalties of the Goods, Chattels, Debts, Lands, Tenements and Hereditaments, as Felons be accustomed to do, according to the Order of the Common Laws of this Realm; (4) and that no Person offending in any such Offence, shall be admitted to his Clergy; (5) and that Justices of Peace shall have Power and Authority, within the Limits of their Commissions and Jurisdictions, to hear and determine the said Offence, as they do use to do in Case of other Felonies.

Public Laws of the State of South Carolina, 1790, p. 49.

The English common law statute banning sodomy issued by Henry VIII reads:

Where in the Parliament begun at London the 3d Day of November in the 21st Years of the late King of most famous Memory, King Henry the Eighth, and after by Prorogation holden at Westminster in the 25th Year of the Reign of said late King, there was one Act and Statute made, entitled, An Act for the Punishment of the Vice of Buggery, whereby the said detestable Vice was made Felony, as in the said Estatute [sic] more and large it doth and may appear: (2) Forasmuch as the said Statute concerning the Punishment of the said Crime and Offence of Buggery standeth at this present repealed and void by Virtue of the Statute of Repeal made in the 1st Year of the Reign of the late Queen Mary: Sithence which Repeal so had

and made divers evil disposed Persons have been the more bold to commit the said most horrible and detestable Vice of Buggery aforesaid, to the high Displeasure of Almighty God.

II. Be it enacted, That the said Statute before mentioned, made in the 25th Year of the said late King Henry the 8th, for the Punishment of the said detestable Vice of Buggery, and every Branch, Clause, Article and Sentence therein contained, shall from and after the 1st Day of June next coming be revived, and from thenceforce shall stand, remain, and be in full Force, Strength and Effect for every, in such Manner, Form and Condition, as the same Statue was at the Day of the Death of the said late King Henry the Eighth, the said Statute of Repeal made in the said 1st Year of the said late Queen Mary or any Words general or special therein contained, or any other Act or Acts, Thing or Things, to the contrary notwithstanding.

Public Laws of the State of South Carolina, 1790, p. 65.

Virginia

Before 1792, Virginia relied on the English common law which made sodomy a punishable crime (see *Hennings Statutes of Virginia,* vol. 9, 1775-1778, ch. V, § VI, p. 127). Virginia passed a specific sodomy ban in 1792:

That if any do commit the detestable and abominable vice of buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without the benefit of clergy.

Virginia Statutes at Large, 1835, p. 113.

State Sodomy Laws in 1868

Alabama

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than two or more than ten years.

Alabama Code, 1852, § 3235, p. 583.

Arkansas

> Every person convicted of sodomy, or buggery, shall be imprisoned in said jail and penitentiary house, for a period not less than five, nor more than 21 years.

Statutes of Arkansas, 1858, ch. 51, Art. IV, § 5, p. 335 (passed in 1838).

California

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the State Prison for a term not less than five years, and which may extend to life.

Statutes 1850, ch. 99, § 48, p. 99.

Florida

> Whoever commits the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State penitentiary not

> exceeding twenty years.

Florida Laws 1868, ch. 1637, Subchap. 8, § 17, p. 98.

Georgia

> Sodomy and bestiality shall be punished by hard labour in the penitentiary, during the natural life or lives of person or persons convicted of these detestable crimes.

Lamar's of Georgia, 1810-1819, § 35, p. 571.

Illinois

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and may extend to life.

Revised Statutes of 1844-45, ch. 30, Div. 5, § 50, p. 158.

Kansas

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by confinement and hard labor not exceeding ten years.

Art. 7, ch. 31, § 249, *General Statutes* of 1868 (found at vol. 2, p. 340, *Statutes of Kansas*, 1897).

Kentucky

> Whoever shall be convicted of the crime of sodomy or buggery with man or beast, he shall be confined in the penitentiary not less than two nor more than five years.

Revised Statutes of 1852, ch. 28, Art. IV, § 11, p. 381.

Louisiana

> Whoever shall be convicted of the detestable and abominable crime against nature, committed with mankind or beast, shall suffer imprisonment at hard labor for life.

Revised Statutes of Louisiana, 1856, "Crimes and Offences," § 5, p. 136.

Maine

> Whoever commits the crime against nature, with mankind or with a beast, shall be punished by imprisonment not less than one, nor more than ten years.

Revised Statutes of 1857, ch. 124, § 3, p. 684.

Michigan

> Every person who shall commit the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment in the State prison not more than fifteen years.

Compiled Laws of 1857, § 5871, p. 1543.

Minnesota

> Every person who shall commit sodomy, or the crime against nature, either with mankind or any beast, shall be punished by imprisonment in the territorial [sic] prison, not more than five years, nor less than one year.

Minnesota Statutes 1858, ch. 96, § 13, p. 729.

Mississippi

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term not more than ten years.

Laws of 1857, ch. 64, Art. 238, § 52, p. 611.

Missouri

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, shall be punished by imprisonment in the penitentiary not less than ten years.

Revised Statutes 1855, ch. 50, § 7, p. 624.

Nevada

> The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the state prison for a term not less than five years and which may extend to life.

The Compiled Laws of Nevada in Force from 1861-1900, § 4699, sec. 45, p. 915 (approved November 26, 1861).

Oregon

> If any person shall commit sodomy or the crime against nature either with mankind or beast, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one year, nor more than five years.

Oregon Organic and General Laws, 1845-64, ch. 48, § 639, p. 560 (passed October 19, 1864).

Tennessee

> Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five nor more than fifteen years.

Code of Tennessee, 1858, § 4843, p. 868.

Texas

> If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.

Penal Code of the State of Texas, 1879, art. 342, p. 46 (passed on February 11, 1860).

Vermont

Vermont had no criminal sodomy statute until 1937, although Vermont courts recognized sodomy as a crime at common law, which could be punished. See *State* v. *La Forrest*, 71 Vt. 311, 45 A. 225 (1899). This is the text of the Vermont criminal sodomy statute passed in 1937:

> A person participating in the act of copulating the mouth of one person with the sexual organ of another shall be imprisoned in the state prison not less than one year nor more than five years.

Vermont Statutes of 1947, ch. 370, § 8480, p. 1593.

West Virginia

> If any person shall commit the crime of buggery, either with mankind or with any brute animal, he shall be confined in the penitentiary not less than one nor more than five years.

Code of West Virginia—1870, ch. 149, § 12, p. 694 (passed in 1868).

Wisconsin

> Every person who shall commit sodomy, or the crime against nature, either with mankind or beast, shall be punished by imprisonment in the state prison, not more than five years nor less than one year.

Revised Statutes of Wisconsin, 1858, ch. 170, § 15, p. 975.

After 1868

Indiana

Indiana did not have a criminal sodomy law at the time of the passage of the 14th Amendment, but passed the following law in 1881:

> Whoever commits the abominable and detestable crime against nature, by having carnal knowledge of a man or beast, or who, being a male, carnally knows any man or any woman through the anus, and whoever entices, allures, instigates, or aids any person under the age of twenty-one years to commit masturbation or self-pollution--is guilty of sodomy, and, upon conviction thereof, shall be imprisoned in the State prison not more than fourteen years nor less than two years.

Revised Statutes of Indiana—1897, ch. 5, art. 5, § 2118, p. 338.

Iowa

Iowa did not have a criminal sodomy law at the time of passage of the 14th Amendment, but later passed the following law in 1892:

> Any person who shall commit sodomy, shall be imprisoned in the penitentiary not more than ten years nor less than one year.

Annotated Code of Iowa, 1897, § 4937, p. 1941, passed 24 General Assembly, ch. 39.

Ohio

Ohio did not have a criminal sodomy law in 1868, at the time of ratification of the Fourteenth Amendment. The Ohio Legislature later passed a criminal sodomy statute in 1885:

> Sec. 1 That whoever shall have carnal copulation against nature, with another human being or with a beast, shall be deemed guilty of sodomy, and shall, on conviction thereof, be imprisoned in the penitentiary not more than twenty years.

Ohio Laws 1885, p. 241 (passed May 4, 1885).

Nebraska

Nebraska had a criminal sodomy law while it was a territory, but not for a few years after it became a state. The Statutes of the Nebraska Territory of 1866 had a criminal sodomy statute at § 47, "Offenses Against Persons," p. 599. Nebraska had no criminal sodomy law at the time the states ratified the Fourteenth Amendment in 1868. The Nebraska State Legislature later passed such a law in 1875, using the exact language of the earlier territorial sodomy law.

> That infamous crime against nature either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not less than one year, and my [sic] extend to life.

Compiled Statutes, 1881, § 245, p. 805.